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Supreme Court of the United States

OCTOBER TERM, 1955

No. 383

GENERAL BOX COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 27, 1955

CERTIORARI GRANTED NOVEMBER 7, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

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[fol. 1]

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 15329

GENERAL BOX COMPANY, Appellant and Cross-Appellee,

versus

UNITED STATES OF AMERICA, Appellee and Cross-Appellant; Board of Commissioners for the Fifth Louisiana Levee District (Third-Party), Appellee and Cross-Appellee

DESIGNATION OF UNITED STATES, AS TO PRINTING RECORD—Filed November 8, 1954

(In Civil Action Nos. 2536 and 2804 from United States District Court for the Western District of Louisiana—Monroe Division.)

Designation of Record for Printing

Now comes the United States of America, appellee and cross-appellant in the above-entitled cause, and designates for printing the following:

[fol. 2] Item—Date Filed

1. Complaint with exhibits (No. 2536)—November 30, 1948.
2. Amended complaint—through paragraph numbered "2" only, the remainder being identical to the original complaint (No. 2536)—January 8, 1949.
3. Motion to dismiss by United States and Pioneer Contracting Co. (No. 2536)—April 20, 1949.
4. Complaint with exhibits (No. 2804)—October 19, 1949.
5. Motion by defendant to dismiss (No. 2804)—December 19, 1949.
6. Waiver of venue in motion to dismiss (No. 2536)—August 15, 1950.
7. Waiver of venue in motion to dismiss (No. 2804)—August 15, 1950.

8. Motion by plaintiff and order dismissing case as to Pioneer Contracting Co. (No. 2536)—October 4, 1950.

9. Opinion overruling motions to dismiss (Nos. 2536 and 2804)—December 30, 1950.

10. Motion and order that Board of Commissioners for Fifth Louisiana Levee District be made a party (No. 2536)—January 13, 1951.

[fol. 3] 11. Motion and order that Board of Commissioners for Fifth Louisiana Levee District be made a party (No. 2804)—January 13, 1951.

12. Third-party complaint—excluding Exhibit "B" thereto which is the amended complaint, supra. No. 2536)—January 13, 1951.

13. Third-party complaint—excluding Exhibit "B" thereto which is the complaint, supra (No. 2804)—January 13, 1951.

14. Answer of United States (No. 2536)—January 18, 1951.

15. Answer of United States (No. 2804)—January 18, 1951.

16. Motion to dismiss by third-party defendant (No. 2536)—February 15, 1951.

17. Motion to dismiss by third-party defendant (No. 2804)—February 15, 1951.

18. Opinion overruling motion to dismiss filed by third-party defendant (Nos. 2536 and 2804)—June 13, 1951.

19. Order overruling motion to dismiss filed by third-party defendant (Nos. 2536 and 2804)—June 13, 1951.

20. Answer by third-party defendant to plaintiff's and third-party plaintiff's complaints (No. 2536)—July 23, 1951.

[fol. 4] 21. Answer by third-party defendant to plaintiff's and third-party plaintiff's complaints (No. 2804)—July 23, 1951.

22. Transcript of testimony (Nos. 2536 and 2804), including the following exhibits: G-1, G-2, G-3 (excluding project plans), G-4 (excluding drawings), G-5, G-6, G-7, G-8, G-9, G-10, G-11, G-12, G-13, G-14, G-17, G-18—February 27, 1952.

23. Opinion on the merits (Nos. 2536 and 2804)—October 14, 1952.

24. Motion by United States for new trial (Nos. 2536 and 2804)—October 22, 1952.

25. Motion by third party defendant for new trial (Nos. 2536 and 2804)—October 23, 1952.

26. Opinion granting new trial (Nos. 2536 and 2804)—June 4, 1953.

27. Transcript of proceedings on new trial (Nos. 2536 and 2804)—September 18, 1953.

28. Opinion on new trial (Nos. 2536 and 2804)—March 31, 1954.

29. Judgment (Nos. 2536 and 2804)—May 17, 1954.

30. Notice of appeal by plaintiff (Nos. 2536 and 2804)—June 11, 1954.

31. Notice of appeal by United States (Nos. 2536 and 2804)—July 16, 1954.

[fok 5] 32. Designation of the record on appeal by the United States (Nos. 2536 and 2804)—

33. Statement of points on appeal—

34. This designation for printing—

Respectfully submitted, United States of America, by T. Fitzhugh Wilson, United States Attorney, Shreveport, Louisiana; William R. Veal, Assistant United States Attorney, Shreveport, Louisiana.

DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION

GENERAL BOX COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA AND PIONEER CONSTRUCTION COMPANY, INC., Defendants

Civil Action No. 2536

COMPLAINT—Filed November 30, 1948

Comes General Box Company, a corporation, plaintiff, and sues the United States of America and Pioneer Con-

[fol. 6] struction Company, Inc., a corporation, defendants, and for its cause of action, states:

1

Plaintiff is a corporation chartered, organized and existing under and by virtue of the laws of the State of Delaware, but qualified to do and doing business in the State of Louisiana.

2

The defendant, Pioneer Construction Company, Inc., is a corporation chartered, organized and existing under and by virtue of the laws of the State of Louisiana, and is qualified to do and is doing business in the State of Louisiana, and is domiciled at Shreveport, Louisiana, where it has offices and agents upon whom service of process may be made.

3

That as to the said Pioneer Construction Company, Inc., there is thus diversity of citizenship, and the amount of the present controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

4

Jurisdiction of this claim against the United States of America is conferred by Section 1346 of the United States Code Judiciary and Judicial Procedure, and Section 1402 of the United States Code Judiciary and Judicial Procedure. That the amount involved is within the limit of $10,000.00 as is provided for in Section . . . . of the said United [fol. 7] States Code Judiciary and Judicial Procedure.

5

The Plaintiff is the owner and actual physical possessor for more than one year prior to the filing of this suit, of the timber and timber rights located upon the land described in the copy of the deed attached hereto marked Exhibit "A" and as such made a part hereof the same as though fully copied herein at length, the timber being situated in Concordia Parish in the State of Louisiana, lying outside the Mississippi River Levee, commonly known as the Babstrom

Levee, that is to say, the timber upon that part of the above described land lying between the Babstrom Levee on the West side of the Mississippi River in the State of Louisiana and the banks of the Mississippi River, the plaintiff having acquired the same under and by v-rtue of a deed, a copy of which, as aforesaid, is attached hereto marked Exhibit "A", and as such made a part hereof the same as though fully copied herein at length.

6

That after the acquisition of the land and timber described in the deed, Exhibit "A" the plaintiff conveyed the land, but reserved and excepted from the deed of conveyance all of the said timber, and attached hereto marked Exhibit "B" is a copy of the deed reserving to the plaintiff the timber upon said land.

[fol. 8]

7

That heretofore on or about August 1, 1947, the defendant, Pioneer Construction Company, Inc., acting of purporting to act under the authority and in the performance of a contract with the United States, entered upon the said land with bulldozers, draglines and other heavy machinery, and willfully, arbitrarily and wantonly destroyed and demolished the said timber belonging to the plaintiff, to the value of $9,000.00, all without the knowledge, consent and permission of the plaintiff, and at a time when the defendant, Pioneer Construction Company, Inc., well knew or was charged with the knowledge that the plaintiff was the owner of the said timber.

8

The United States also knew or was chargeable with knowledge that the plaintiff was the owner of said timber, and subsequent thereto, the plaintiff was consummated without notice to the plaintiff and without compliance with the laws and the rules and regulations of both state and federal agencies in respect to such matters; and contrary to the provisions of what is generally known as the Federal Flood Control Act, as amended.

9

That at the time of the wrongful destruction of said timber, and subsequent thereto, the plaintiff was not dealt with either by the contractor or by the government in respect to the said proposed contract as owner of the timber or upon [fol. 9] any basis whatever, and that the action of the government and the said contractor not only specifically violated the provisions of the said Flood Control Act and all regulations adopted by the United States Army Engineers and other federal agencies in reference thereto but violated also all customs and regulations of the levee boards of the State of Louisiana and all other state agencies exercising authority in reference to the subject matter of said construction contract.

10

Plaintiff does not have a copy of the contract between the United States of America and the said Pioneer Construction Company, Inc., for the construction of said Item M 343 R D & E for the enlargement of the Babstrom Levee, and said contract is within the exclusive knowledge and possession of the defendant, Pioneer Construction Company, Inc., and the United States of America, and the plaintiff calls upon the defendants to have and produce the said contract and to make discovery of same and to file the same with their answers to this complaint.

11

In respect thereto the plaintiff shows on information and belief that all acts committed by the said Pioneer Construction Company, Inc., in fulfillment of its obligations under the said contract were not only specifically carried out with the knowledge, consent and approval of the United States Army Engineers having authority in the premises, but that the said contract specifically anticipated that the said timber was to be destroyed totally rather than that the plain- [fol. 10] tiff as the owner thereof was to be afforded the reasonable opportunity to salvage the value of said timber by cutting the same prior to the carrying out of the said construction contract.

12

That the plaintiff was given no notice of any kind, and was afforded no opportunity, to cut and remove the said timber.

13

Plaintiff shows that the area where said wrongful appropriation was committed as isolated and that plaintiff had no knowledge thereof until after the said timber had been destroyed, and that on or about the 25th day of August, 1948, plaintiff, through attorneys, directed a communication to the Pioneer Construction Company, Inc., and the General Accounting Office of the United States of America, in words and figures as follows:

"August 25, 1948.

Pioneer Construction Company, Inc., 453 Plum Avenue, Memphis, Tennessee.

General Accounting Office, U. S. of America, Reconciliation & Claims Division, Washington 25, D. C.

GENTLEMEN:

The General Box Company of Natchez, Mississippi, has employed Mr. Carl Chadwick, attorney of Natchez, Mississippi, and our firm, in its claim against you for the destruc- [fol. 11] tion of certain timber located between the Babstrom Levee and the Mississippi River, in Concordia Parish, Louisiana.

The Pioneer Construction Company did this damage in the performance of Items D and E under Contract M-343-R, on Babstrom Levee, in the lower Tensas Levee district, Concordia Parish, Louisiana.

This timber, as stated above, was between the levee and the Mississippi River. The General Box Company acquired the property under a deed dated October 17, 1946, recorded in CRD-3, page 329, Concordia Parish. On November 27, 1946, The General Box Company sold the realty to Orrin James, but retained the timber with removal period of twenty years. This latter deed is recorded in the same parish, in CRD—3, at page 460.

The General Box Company was given no notice whatever

that the contractor was going onto the said land, and had no opportunity whatsoever to salvage any timber from this tract.

It is our opinion that the claim of the General Box Company has merit to it, and that the box company is entitled to the damages for the needless destruction and demolition of its timber,

[fol. 12] Our instructions are to file suit for the damages, but if you are inclined to enter into amicable negotiations, working toward a settlement of the claim, we will be glad to withhold filing the suit, provided you let us hear from you within the course of the next few days.

Respectfully yours, Barnett, Barnett & Jones, By (S.) P. Z. Jones.

PZJ:dbj"

14

That the wrongful destruction of said timber was a continuous action on the part of the said contractor, which was not completed in compliance with the provisions of said contract until within one year of the bringing of this action.

15

The the destruction of said timber was the taking of said timber, the property of the plaintiff, within the meaning of the Fifth Amendment to the Federal Constitution; and plaintiff as owner is entitled as compensation for the full and true value thereof.

16

Plaintiff shows further that the area in which the said timber was located is of a nature where bar pits could have been easily located affording adequate soil and dirt for the purposes of said construction contract without involving the said timber in any way whatever, and plaintiff further shows [fol. 13] that in this area the levee which was increased in size by the said contract is approximately one mile from the Mississippi River, and that the area where the said timber was located is not regularly subject to overflow dependent upon the seasonal rise and fall of the said Mississippi River,

and that the said area is outside of and beyond the banks of the river and is in no true sense batture.

17

That the said contract was executed under the said Flood Control Act, as shown, as amended, under the provisions of which no local contributions of any kind were expected, but that in any event and whatever test of local law or custom is applied that the destruction of said timber was not the exercise of any local contribution or of any riparian servitude of any kind or character, either state or federal, and that it in any event represented no more or less than a reckless and unnecessary destruction of the said timber, the practical effect of which could have been readily avoided if plaintiff had been properly notified and afforded a reasonable opportunity to cut and remove the said timber as it was willing to do.

18

That the said project was a part of an over-all flood control program involving the whole of the lower Mississippi River, and that it was in no sense an emergency project.

19

Plaintiff brings this its suit jointly and severally and in solido against the said Pioneer Construction Company, Inc., and the United States of America in the venue where the [fol. 14] said wrongful appropriation was committed and for the loss sustained and the damage it suffered, all in the sum of $9,000.00, by the acts of the defendants acting jointly and severally and in solido, and plaintiff asks judgment jointly and severally and in solido in the sum of $9,000.00, or in the alternative asks judgment severally and in solido against each or either of the defendants for the said sum of $9,000.00, together with interest and costs.

20

Plaintiff demands a trial by jury as to all issues with the Pioneer Construction Company, Inc., and for trial as to the

United States of America by the Court, as is allowed under the statutes hereby invoked in respect to the United States.

Further for general and equitable relief in the premises.

(S.) Carl C. Chadwick, Natchez, Mississippi. (S.) Fred G. Benton, Baton Rouge, Louisiana. (S.) Barnett, Barnett & Jones, 414½ East Capitol Street, Jackson, Mississippi. By P. Z. Jones, Attorneys for Plaintiff. (S.) Jackson R. Davis, 408 Slattery Bldg., Shreveport, Louisiana.

[fol. 15] EXHIBIT A TO COMPLAINT

STATE OF ARKANSAS,
County of Cleburne:

Be It Known and Remembered, that before me, the undersigned authority, duly commissioned and qualified according to law in and for said County and State, and in the presence of the two undersigned competent witnesses, there personally came and appeared John H. Bridwell, a married man whose wife's name is Laura A. Bridwell, a resident of Heber Springs, Cleburne County, Arkansas, who declared unto me, Notary, as follows, to-wit:

That for the price and consideration, and on the terms and conditions hereinafter set forth, he has bargained, sold, transferred and conveyed, and does by these presents bargain, sell, transfer, convey and deliver unto and in favor of the General Box Company, Inc., a Delaware Corporation, having its principal place of business in Chicago, Cook County, Illinois, all and singular, the following described property situated, lying and being in the Parish of Concordia, State of Louisiana, to-wit:

That certain plantation known as Roseland, consisting of Sections Five (5) to Nine (9), both inclusive; Twenty Six (26) to Twenty Nine (29), both inclusive; the South Half (S ½) of Section Thirty (30); and all of Section Forty Two (42), all in Township 4 North, Range 9 East, excepting the portions of said Sections which have caved into the Mississippi River, but including all the accretions, alluvium, batture lands or relictions which have been heretofore or which may hereafter be added thereto.

[fol. 16] Together with all the buildings and improvements

thereon, and all rights, ways, privileges and appurtenances thereto belonging or in any manner appertaining.

Being the same lands acquired by John H. Bridwell from Charles A. Goding by deed dated December 12, 1934, recorded December 17, 1934, in Conveyance Record "JJ" Page 586 of the Records of Concordia Parish, Louisiana, to which deed special reference is hereby made.

The vendor herein reserves unto himself, his heirs, and assigns and there is specially Excepted from this sale one-half (½) of the oil, gas and other minerals in, under and that may be produced from the hereinabove described land, with the right of ingress and egress for the purpose of exploring for, extracting and producing said oil, gas and other minerals.

To Have and To Hold said property, with all improvements and appurtenances thereon, unto the said vendee and to its successors and assigns forever, with full warranty of title and subrogation and substitution of warranty and prescription against all preceding vendors.

Said appearer further declared unto me, Notary, that the price and consideration of this sale is the price and sum of Thirty Thousand Dollars, ($30,000.00), cash in hand paid by said vendee unto said vendor, receipt of which is hereby acknowledged by said vendor and full acquittance and discharge granted therefor.

[fol. 17] The mortgage certificate required by law is annexed hereto and made a part hereof.

All taxes assessed against the above described lands have been paid for the years 1943, 1944 and 1945, as is evidenced by the Certificate of the Sheriff & Ex-Officio Tax Collector of Concordia Parish, Louisiana, annexed hereto and made part hereof as required by law.

In Testimony Whereof, I have caused said appearer to sign this Act at my office in said County and State, on this, the 21st day of September, 1946, in the presence of Sam D. Morton and Bertha U. Wilson, the two undersigned competent witnesses, who have signed as such with said appearer and me, Notary, after due reading of the whole.

(S.) John U. Bridwell, (S.) Laura R. Bridwell, (S.) C. A. Holland, Notary Public, Cleburne County, Ark. (Seal.)

Witnesses: Sam D. Morton, Bertha U. Wilson.

STATE OF LOUISIANA,
Parish of Concordia:

I, V. P. Campbell, Clerk of the Court and as such Ex-Officio Parish Recorder, duly commissioned and qualified do hereby certify that I have this day made a thorough and careful examination of the mortgage records of my office in the name of J. H. Bridwell and find no mortgages or other encumbrances bearing on or affecting the following de-
[fol. 18] scribed property, to-wit:

Roseland Plantation, bounded on the North by lands of Brabston; East by Point Pleasant Plantation; South of Mississippi River and West by Swamp; consisting of Secs. 5 to 9 inclusive, and 26 to 29 inclusive, the S½ of Sec. 30 and all of Sec. 42 all in T 4 N R 9 E., with accretions thereto, containing 2054 acres.

Witness my official signature and the seal of my office at Vidalia, Louisiana, this the 16th day of September, 1946.

V. P. Campbell, Clerk of said Court.

STATE OF LOUISIANA,
Parish of Concordia:

I, Noah Cross, Sheriff & Ex-Officio Tax Collector of Concordia Parish, Louisiana, do hereby certify that all taxes assessed against the below described property for the years 1943, 1944 and 1945 have been paid, to-wit:

Roseland Plantation, bounded on the North by lands of Brabston; East by Point Pleasant Plantation; south by Mississippi River and West by swamp; consisting of Secs. 5 to 9, inclusive, and 26 to 29, inclusive, the S½ of Section 30 and all of Sec. 42, all in T. 4 N. R. 9 E. with accretions thereto, containing 2054 acres.

[fol. 19] Signed officially at Vidalia in Concordia Parish, Louisiana, this 16th day of September, 1946.

B. T. Wilgus, Deputy Sheriff & Ex-Officio Tax Collector of Concordia Parish, La.

EXHIBIT B TO COMPLAINT

STATE OF ILLINOIS,
County of Cook:

Be It Known and Remembered that before me, the undersigned authority, duly commissioned and qualified accord-

ing to law in and for said County and State, and in the presence of the witnesses hereinafter named and undersigned, there came and appeared the General Box Company, Inc., a Delaware corporation, having its principal place of business in Chicago, Cook County, Illinois, appearing herein through N. W. Embry, President, and Paul E. Duzeski, Secretary, thereof, herein jointly acting for and on behalf of said Corporation and duly authorized to act therefor by virtue of resolution adopted by Board of Directors of said Corporation, an extract certified copy of which is annexed to and made a part hereof, who declared unto me, Notary, as follows, to-wit:

That for the price and consideration, and on the terms and conditions hereinafter expressed, it has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and deliver unto and in favor of Orrin James, a married man whose wife's maiden name was Myrtle Smith, a resident of Tensas Parish, Louisiana, [fol. 20] all and singular, the following described property situated in the Parish of Concordia, state of Louisiana, to-wit:

That certain Plantation known as Roseland, in Concordia Parish, Louisiana, consisting of Sections Five (5) to Nine (9), both inclusive; Twenty-six (26) to Twenty-nine (29), both inclusive; the South Half (S½) of Section Thirty (30); and all of Section Forty-two (42), all in Township 4 North, Range 9 East, excepting the portions of said Sections which have caved into the Mississippi River, but including all the accretions, alluvium, batture lands or relictions which have been heretofore or which may hereafter be added thereto.

Together with all the buildings and improvements thereon, and all rights, ways, privileges and appurtenances thereto belonging or in any manner appertaining.

Being the same property which was acquired by General Box Company, Inc., from John H. Bridwell and Laura A. Bridwell by deed dated September 21, 1946, and filed for record at 10:05 A. M., on October 17, 1946, under File No. 24416, in the Office of the Clerk of Court of Concordia Parish, Louisiana, to which deed special reference is hereby made.

This conveyance is made, however, subject to the reservations made by the said John H. Bridwell, et al., his heirs and assigns, of an undivided one-half (½) of the oil, gas and other minerals in, under and that may be produced from the hereinabove described lands, with the right of ingress and egress for the purpose of exploring for, extracting and producing said oil, gas and other minerals, which [fol. 21] reservation was contained in the deed from the said Bridwell to said General Box Company, Inc., dated September 21, 1946, and recorded as above set forth.

There Is Excepted From This Sale and reserved by the said General Box Company, Inc., for the benefit of itself, its successors or assigns, all the timber of every kind and character whatsoever now standing, growing and being on the above described lands, or which may hereafter grow thereon, for a period of twenty (20) years from the date of this deed, with full rights of ingress and egress in, over and across the above described property, subject only to the restriction hereinafter set forth, for the removal of the timber hereby reserved, together with the right to the use or dump grounds, camp sites, or any other privileges on said property which may be necessary or desirable for the cutting or removal of said timber, it being understood, however, as to the old field on the protected side of the United States Government Levee running through the above described property the said vendor shall have the right to make not more than three (3) roads for the purpose of hauling or logging said timber across the same, and as to such old field, it is further understood and agreed that the said vendee shall have the right to clear the same of the brush and undergrowth or small timber thereon so as to place same in cultivation, but other than this, he is not to cut or remove, during the 20-year period aforesaid, any timber whatsoever standing, growing or being on said above described lands.

To Have And To Hold the above described property, with all improvements and appurtenances thereon, unto the [fol. 22] said vendee, his heirs and assigns forever, with full warranty of title and subrogation and substitution of warranty and prescription against all preceding vendors.

The price and consideration of this sale is the price

and sum of Fifteen Thousand and No/100 Dollars ($15,000.00) of which amount there has been paid in cash by the said vendee to the said vendor at the time of the execution of this deed, the sum of Five Thousand and No/100 Dollars ($5,000.00), the receipt of which is hereby acknowledged by said vendor and full acquittance and discharge granted therefor; and in order to represent the balance of said purchase price, to-wit: in order to represent the sum of Ten Thousand and no/100 Dollars ($10,000.00) I, the said vendee has made and executed his Two (2) certain promissory notes, each in the amount of Five Thousand Dollars ($5,000.00), drawn by the said vendee to his own order and by himself indorsed in blank, dated of even date with the acceptance of this instrument by said vendee, bearing Five per cent (5%) per annum interest from date until paid, said interest payable annually, stipulating for the payment of Ten per cent (10%) additional as attorney's fees if placed in the hands of an attorney for collection after maturity, or if sued upon, and due and payable at the Britton & Koontz National Bank, in Natchez, Mississippi, on the 27th day of November of the years 1947 and 1948, respectively,—both of which said notes have been paraphed "Ne Varietur" in order to identify the same herewith by the Notary Public before whom said vendee has signed this Act for the purpose of accepting the same. [fol. 23] Now in order to secure the full, prompt and punctual payment of said above described promnissory notes at their respective maturity dates, together with the interest thereon and attorney's fees, as hereinabove stipulated, said vendee declared unto me, Notary, that he hereby recognizes in favor of said vendor, or any future lawful holder or holders of said notes, or any one of them, the vendor's lien and privilege on the property conveyed to him as hereinabove described, and hereby specially mortgages, hypothecates and effects said property in favor of said vendor, or any future lawful holder or holders of said notes, or any one of them, binding himself not to alienate, deteriorate or encumber said property to the prejudice of this Act, confessing judgment for the full amount of said indebtedness in principal, interest and attorney's fees and authorizing the seizure and sale of said property to pay

said indebtedness at maturity, by Executory Process, or otherwise.

And said vendee further declared unto me, Notary, that in the event he should fail to promptly pay either of the above described promissory notes at maturity, in principal and/or interest, or in the event he should fail to pay the taxes which may be assessed against the above described property any year during the life of this vendor's mortgage before said property is advertised at tax sale, then and in any of these events, the said vendor, or any future lawful holder or owners of said notes, or any one of them, shall have the right and privilege, to be exercised by it, his and/or their option, of declaring said promissory notes due and exigible.

[fol. 24] The mortgage certificate otherwise required by law is waived by the parties hereto, who hold me, Notary harmless for its non-production.

All taxes assessed against the above described lands for the years 1943, 1944 and 1945 have been paid, as is evidenced by the certificate of the Sheriff & Ex-Officio Tax Collector of Concordia Parish, Louisiana, annexed hereto and made part hereof as required by law. The taxes assessed against the above described lands for the year 1946, now due and unpaid, are to be paid equally by the vendor and the vendee herein before they become delinquent.

And now before me, ... a Notary Public in and for the Parish of Concordia, State of Louisiana, and in the presence of the witnesses hereinafter named and undersigned, there personally came and appeared the said Orrin James, the purchaser herein, who declared that he has taken full cognizance of the above and foregoing act of sale, with vendor's lien and mortgage retained, in all of its parts and clauses, consenting thereto and accepting the same and acknowledging due delivery and possession of the said above described property.

[fol. 25] This Act of Sale thus done, read and signed by the said vendor at Chicago, Cook County, Illinois, all in the presence of Joseph Newhouse and Dorothy Epps, the two undersigned competent witnesses, who have hereunto signed the same as such with said appearers and me, the

undersigned Notary Public, on this the 15th day of November, 1946, after due reading of the whole hereof.

General Box Company, Inc., by N. W. Empry, President; by Paul E. Duzeski, Secretary. Hildah A. Johnson, Notary Public, Cook County, Illinois. (Seal) My commission expires: November 17, 1947.

Witnesses: Joseph J. Newhouse, Dorothy Epps.

(Documentary stamps in amount of $16.50 attached to original and properly cancelled.)

And This Act Of Sale thus done, read and signed for the purpose of accepting the same by Orrin James, the above mentioned vendee or purchaser, at Vidalia, in the Parish of Concordia, State of Louisiana, all in the presence of B. T. Wilgus and Roy Barlow, the two undersigned competent witnesses who have hereunto signed the same as such with said appearer and me, the undersigned Notary [fol. 26] Public, on this, the 27th day of November, 1946, after due reading of the whole hereof.

Orrin James, V. P. Campbell, Notary Public Concordia Parish, Louisiana. (Seal)

Witness: B. T. Wilgus, Roy Barlow.

STATE OF LOUISIANA,
Parish of Concordia:

I, Noah Cross, Sheriff & Ex-Officio Tax Collector of Concordia Parish, Louisiana, do hereby certify that all taxes assessed against the following described property for the years 1943, 1944 and 1945 have been paid, but that the taxes for the year 1946 are now due and unpaid;

Roseland Plantation, bounded on the North by lands of Brabston; East by Point Pleasant Plantation; South by Mississippi River and West by swamp; consisting of Secs. 5 to 9, inclusive, and 26 to 29 inclusive, the S½ of Section 30 and all of Sec. 42, all in T. 4 N. R. 9 E., with accretions thereto, containing 2054 acres.

Signed officially at Vidalia, in Concordia Parish, Louisiana, this 27th day of November, 1946.

B. T. Wilgus, Deputy Sheriff & Ex-Officio Tax Collector, Concordia Parish, Louisiana.

[fol. 27] Certified Copy of Resolution of Board of Directors of General Box Company

I, the undersigned, Paul E. Duzeski, Secretary of General Box Company, a corporation organized under the laws of the State of Delaware, do hereby certify that the following is a true and correct copy of resolution adopted by the Board of Directors of said company at meeting held at the office of the company in Chicago, Illinois, on Friday, November 15, 1946:

"Resolved by the Board of Directors of General Box Company that the President and Secretary of this company be and they are hereby authorized and directed to sell to Orrin James, a married man, whose wife's maiden name was Myrtle Smith, a resident of Tensas Parish, Louisiana, and to execute such conveyance as may be necessary covering the following described property situated in the Parish of Concordia, State of Louisiana, to-wit:

That certain Plantation known as Roseland in Concordia Parish, Louisiana, consisting of Sections Five (5) to Nine (9), both inclusive; Twenty-six (26) to Twenty-nine (29), both inclusive; the South Half (S½) of Section Thirty (30); and all of Section Forty-two (42), all in Township 4 North, Range 9 East, excepting the portions of said Sections which have caved into the Mississippi River, but including all the accretions, alluvium, batture lands or relictions which have been heretofore or which may hereafter be added thereto.

Together with all the buildings and improvements thereon, and all rights, ways, privileges and appurtenances [fol. 28] thereto belonging or in any manner appertaining.

Being the same property which was acquired by General Box Company, Inc., from John H. Bridwell and Laura A. Bridwell by deed dated September 21, 1946, and filed for record at 10:05 A. M. on October 17, 1946, under File No. 24416, in the office of the Clerk of Court of Concordia Parish, Louisiana to which deed special reference is hereby made.

This conveyance is made, however, subject to the reservation made by the said John A. Bridwell et al., his heirs and assigns, of an undivided one-half (½) of the oil, gas and

other minerals in, under and that may be produced from the hereinabove described lands, with the right of ingress and egress for the purpose of exploring for, extracting and producing said oil, gas and other minerals, which reservation was contained in the deed from the said Bridwell to said General Box Company, Inc., dated September 21, 1946, and recorded as above set forth.

There Is Excepted From This Sale and reserved by the said General Box Company, Inc., for the benefit of itself, its successors or assigns, all the timber of every kind and character whatsoever now standing, growing and being on the above described lands, or which may hereafter grow thereon, for a period of twenty (20) years from the date of this deed, with full rights of ingress and egress in, over and across the above described property, subject only to the restriction hereinafter set forth, for the removal of the timber hereby reserved, together with the right to the use of dump grounds, camp sites, or any other privileges on [fol. 29] said property which may be necessary or desirable for the cutting or removal of said timber, it being understood, however, as to the old field on the protected side of the United States Government Levee running through the above described property the said vendor shall have the right to make not more than three (3) roads for the purpose of hauling or logging said timber across the same, and as to such old field, it is further understood and agreed that the said vendee shall have the right to clear the same of the brush and undergrowth or small timber thereon so as to place same in cultivation, but other than this, he is not to cut or remove, during the 20-year period, aforesaid, any timber whatsoever standing, growing or being on said above described lands.

That the price and consideration of the sale shall be $15,000.00 of which $5,000.00 shall be paid in cash and the balance $10,000.00 to be evidenced by two certain promissory notes to be executed by said Grantee each in the sum of $5,000.00 bearing interest at the rate of Five Per Cent per annum payable one and two years, respectively, from the date thereof."

In Witness Whereof my signature as Secretary of and

corporate seal of said corporation on this the 15th day of November, 1946.

Paul E. Duzeski, Secretary. (Seal.).

[File endorsement omitted.]

[fol. 30] [File endorsement omitted]

DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION

Civil Action No. 2536

[Title omitted]

AMENDED COMPLAINT—Filed January 8, 1949

Comes General Box Company, a corporation, plaintiff, and files this its amended complaint against the United States of America and the Pioneer Contracting Co., Inc., a corporation, defendants, the plaintiff amending its original complaint by substituting as a defendant Pioneer Contracting Co., Inc., in lieu and instead of the Pioneer Construction Company, Inc., and for its cause of action states:

1

Plaintiff is a corporation chartered, organized and existing under and by virtue of the laws of the State of Delaware, but qualified to do and doing business in the State of Louisiana.

2

The defendant, Pioneer Contracting Co., Inc., is a corporation chartered, organized and existing under and by [fol. 31] virtue of the laws of the State of Tennessee, with its office and principal place of business at 453 Plum Street, Memphis, Tennessee. It is not qualified to do, but is doing and has done business in the State of Louisiana, and the cause of action herein asserted by the plaintiff, arose in the State of Louisiana from the doing by this foreign corporation of business in the State of Louisiana, and more par-

ticularly, within the Monroe Division of the District Court of the United States, in and for the Western District of Louisiana. The Pioneer Contracting Co., Inc., has not appointed a resident agent for service of process in the State of Louisiana, and if the officer charged with the duty of making service of process upon the Pioneer Contracting Co., Inc., is not able, after diligent effort, to perfect service of process upon the defendant, Pioneer Contracting Co., Inc., he should report to this Court for an order directing that service be made upon the Secretary of State of the State of Louisiana. The said Secretary of State upon said service of process upon him, should forthwith send by registered mail addressed to the Pioneer Contracting Co., Inc., 453 Plum Street, Memphis, Tennessee, the originals of the papers served, all in the manner and mode as prescribed by Section 1249 of the Louisiana General Statutes (Section 26 et seq., Act 267, Laws of 1914; Act 184 Laws of 1924.)

3

That as to the said Pioneer Contracting Co., Inc., there is thus diversity of Citizenship, and the amount of the present controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

[fol. 32] 4

Jurisdiction of this claim against the United States of America is conferred by Section 1346 of the United States Code Judiciary and Judicial Procedure, and Section 1402 of the United States Code Judiciary and Judicial Procedure. That the amount involved is within the limit of $10,000.00 as is provided for in Section . . . of the said United States Code Judiciary and Judicial Procedure.

5

The plaintiff is the owner and actual physical possessor for more than one year prior to the filing of this suit, of the timber and timber rights located upon the land described in the copy of the deed attached hereto marked Exhibit "A" and as such made a part hereof the same as though fully copied herein at length, the timber being situated in Con-

cordia Parish in the State of Louisiana, lying outside the Mississippi River Levee, commonly known as the Babstrom Levee, that is to say, the timber upon that part of the above described land lying between the Babstrom Levee on the West side of the Mississippi River in the State of Louisiana and the banks of the Mississippi River, the plaintiff having acquired the same under and by virtue of a deed, a copy of which, as aforesaid, is attached hereto marked Exhibit "A", and as such made a part hereof the same as though fully copied herein at length.

6

That after the acquisition of the land and timber described in the deed, Exhibit "A", the plaintiff conveyed [fol. 33] the land, but reserved and excepted from the deed of conveyance all of the said timber, and attached hereto marked Exhibit "B" is a copy of the deed reserving to the plaintiff the timber upon said land.

7

That heretofore on or about August 1, 1947, the defendant, Pioneer Contracting Co., Inc., acting or purporting to act under the authority and in the performance of a contract with the United States, entered upon the said land with bulldozers, draglines and other heavy machinery, and willfully, arbitrarily and wantonly destroyed and demolished the said timber belonging to the plaintiff, to the value of $9,000.00, all without the knowledge, consent and permission of the plaintiff, and at a time when the defendant, Pioneer Contracting Co., Inc., well knew or was charged with the knowledge that the plaintiff was the owner of the said timber.

8

The United States also knew or was chargeable with knowledge that the plaintiff was the owner of said timber despite which fact the said contract was consummated without notice to the plaintiff and without compliance with the laws and the rules and regulations of both state and Federal agencies in respect to such matters; and contrary to the provisions of what is generally known as the Federal Flood Control Act, as amended.

[fol. 34] 9

That at the time of the wrongful destruction of said timber, and subsequent thereto, the plaintiff was not dealt with either by the contractor or by the government in respect to the said proposed contract as owner of the timber or upon any basis whatever, and that the action of the government and the said contractor not only specifically violated the provisions of the said Flood Control Act and all regulations adopted by the United States Army Engineers and other federal agencies in reference thereto but violated also all customs and regulations of the levee boards of the State of Louisiana and all other state agencies exercising authority in reference to the subject matter of said construction contract.

10.

Plaintiff does not have a copy of the contract between the United States of America and the said Pioneer Contracting Co., Inc., for the construction of said Item H 343.H D & E for the enlargement of the Babstron Levee, and said contract is within the exclusive knowledge and possession of the defendant, Pioneer Contracting Co., Inc., and the United States of America, and the plaintiff calls upon the defendants to have and produce the said contract and to make discovery of same and to file the same with their answers to this complaint.

11

In respect thereto the plaintiff shows on information and belief that all acts committed by the said Pioneer Contracting Co., Inc., in fulfillment of its obligations under the said [fol. 35] contract were not only specifically carried out with the knowledge, consent and approval of the United States Army Engineers having authority in the premises, but that the said contract specifically anticipated that the said timber was to be destroyed totally rather than that the plaintiff as the owner thereof was to be afforded the reasonable opportunity to salvage the value of said timber by cutting the same prior to the carrying out of the said construction contract.

19

Answering paragraph 19, defendant denies that it is liable to the plaintiff in the sum of $9,000.00, or in any sum whatsoever.

[fol. 74] The allegations of paragraph 20 are denied.

Wherefore, defendant prays that upon trial hereof the demands of the plaintiff be rejected and disallowed at its costs.

——— ———, United States Attorney, (S.) Wm. J. Flenniken, Assistant U. S. Attorney, (S.) Sol B. Pressburg, Special Attorney, Department of Justice.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF THIRD-PARTY DEFENDANT TO DISMISS—FILED FEBRUARY 15, 1951

Civil Action No. 2536

Third-Party Defendant moves the Court as follows:

To dismiss the action because the complaint fails to state a claim against third-party defendant upon which relief can be granted.

(S.) Thompson L. Clarke, District Attorney, Sixth Judicial District, State of La., and Legal Advisor for said Third-Party Defendant.

[fol. 75] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

COURT'S OPINION ON MOTIONS TO DISMISS—June 12, 1951

Civil Actions Nos. 2536 and 2804

For Plaintiff: Messrs. Carl A. Chadwick, Natchez, Mississippi; Fred G. Benton, Baton Rouge, Louisiana; Barnett, Jones & Montgomery, Jackson, Mississippi.

For Defendant: William J. Fleniken, Acting U. S. Attorney; Sol B. Pressburg, Special Attorney, Department of Justice, Alexandria, Louisiana.

For Third-Party Defendant: Thompson L. Clarke, St. Joseph, Louisiana.

DAWKINS, J.:

After due consideration of the motions to dismiss the third-party complaints in each of the above cases, the same are overruled.

Done and Signed, in chambers, at Monroe, Louisiana, on this 12 day of June, 1951.

(S.) Ben C. Dawkins, Judge.

[fol. 76] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER OF THIRD-PARTY DEFENDANT—Filed June 23, 1951

Civil Action No. 2536

Now comes the Board of Commissioners for the Fifth Louisiana Levee District, made Third-Party Defendant in the above styled cause of action, and, reserving all rights heretofore asserted in motions and/or exceptions previously filed, answers plaintiff's and Third-Party Plaintiff's complaints as follows, to-wit:

First Defense

The complaints fail to state a claim on which relief can be granted in this cause in that:

1. The acts and things complained of are discretionary acts for which the United States of America and/or the

Board of Commissioners for the Fifth Louisiana Levee District are not liable under the provisions of subsection (a) of Section 2680, Title 28, U. S. C. A.

2. The work on the Babstrom Levee Project, where this damage is alleged to have occurred, was performed by the Pioneer Contracting Company, Inc., under a construction contract with the United States of America, and the United [fol. 77] States of America and/or the Board of Commissioners for the Fifth Louisiana Levee District are not responsible for the acts of said contractor. (Section 2671, Title 28, U. S. C. A.).

3. That under Article 16, Section 6 of the Constitution of the State of Louisiana for the year 1921, the Board of Commissioners for the Fifth Louisiana Levee District is permitted by law to disburse its funds in compensation only for lands and improvements thereon actually used or destroyed for levee or levee drainage purposes; that under said Article and Section of said Constitution, said Third-Party Defendant is not permitted to pay for timber used or destroyed as the result of levee enlargement or construction.

4. That under said Article and Section of said Constitution referred to, supra, said Third-Party Defendant is not permitted to pay for batture land used or destroyed for levee purposes; that the land on which said timber was growing and which plaintiff is claiming was destroyed in the enlargement of the Babstrom and Ashland levees, was batture land; that said timber was an immovable by destination, and, therefore, a part of said land.

5. That under the terms and provisions of said article and Section of said Constitution above referred to, supra, it is necessary for plaintiff herein to allege that the timber claimed to have been destroyed was assessed on the tax rolls of Concordia Parish, Louisiana for the year preceding its destruction; that plaintiff's complaint failed to allege the assessment of said timber as required by law.

[fol. 78] 6. Third-Party Defendant avers that it gave due and written notice to the record owners of the land on which the timber was situated that the said Babstrom and Ashland levees would be enlarged and that additional rights of way would be required; that under the laws of the State

of Louisiana it is only chargeable with a responsibility to give such notice to said land owners, and in no manner is obligated under said laws to notify owners of timber that same might be destroyed or used in the construction or enlargement of levees.

Second Defense

Third-Party Defendant affirmatively shows that prior to the time the work was actually commenced and begun on the Babstrom and Ashland levee enlargements, plaintiff had knowledge of the fact that said enlargements of said levees was to be commenced, and that as the said work progressed its timber would be damaged in order that this work might be completed; that representatives of plaintiff had an informal agreement with representatives of the Pioneer Contracting Company, Inc., whereby said contractor was to do and perform certain acts in order to conserve and save as much of the merchantable timber as could be saved during the construction of said enlargements.

Third Defense

1

Third-Party Defendants admits the allegations contained in paragraph One.

[fol. 79]

2

In answer to paragraph Two, respondent is not called upon to admit or deny the allegations in said paragraph as same pertain solely to the status of the Pioneer Contracting Company, Inc.

3

In answer to paragraph Three, respondent is not called upon to admit or deny the allegations in said paragraph as same pertain solely to the status of the Pioneer Contracting Company, Inc.

4

In answer to paragraph Four of the complaint, the matters therein alleged being conclusions of law, your respondent is not called upon to either admit or deny, but if called upon to do so, then same are denied.

5

That due to the lack of sufficient information upon which to base a belief, Third-Party Defendant denies that plaintiff was the owner of said timber referred to in paragraph Five, but does admit that said timber was situated in Concordia Parish in the State of Louisiana, and lay outside of the Mississippi River Levee commonly known as the Babstrom Levee; that is to say, the timber upon the land referred to in paragraph Five lay between the Babstrom Levee on the west side of the Mississippi River, in the State of Louisiana, and the Mississippi River.

[fol. 80] 6

Due to the lack of sufficient information upon which to base a relief, the allegations of paragraph Six are denied.

7

Third-Party Defendant denies the allegations contained in paragraph Seven except as herein admitted, modified or explained.

Further answering said paragraph Seven, Third-Party Defendant shows that the H. B. Blanks Construction Company the Pioneer Contracting Company, Inc., under contracts with the United States of America, entered upon the lands referred to in paragraph Five, supra, with equipment and machinery necessary for the clearing of the right of way for the Babstrom and Ashland levee enlargements, and cleared the growing timber and other vegetation from such land as was necessary to secure earth for the construction of the said Babstrom and Ashland Levee enlargements. Third-Party Defendant expressly denies that the said H. B. Blanks Construction Company and/or the Pioneer Contracting Company, Inc., willfully, arbitrarily and wantonly destroyed any timber belonging to the plaintiff and expressly denies that the defendant or the Third-Party Defendant herein are liable to plaintiff for timber to the value of $9,000.00, or in any amount whatsoever.

8

In answer to paragraph Eight, Third-Party Defendant denies the allegations contained therein except as herein admitted, modified or explained.

[fol. 81] Further answering said paragraph, Third-Party Defendant shows that the rights of way for the Babstrom and Ashland levee enlargements were appropriated by the Third-Party Defendant under the Police Powers granted it by its sovereignty, the State of Louisiana; that thereafterwards the United States of America was authorized by said Third-Party Defendant to enter thereon and construct said levee enlargements, which construction included the clearing and removing of the timber and other vegetation from the right of way. Third-Party Defendant expressly denies that the appropriation of the right of way by the Board of Commissioners for the Fifth Louisiana Levee District, Third-Party Defendant herein, was contrary to the laws, rules and regulations of the State of Louisiana and Governmental Agencies with respect to such matters, and further denies that the appropriation of the right of way was contrary to the Flood Control Acts of the United States.

9

In answer to paragraph Nine, the allegations therein contained are denied except as admitted, modified or explained in the preceding paragraph Eight hereof.

Further answering said paragraph, Third-Party Defendant shows that the plaintiff herein, through its duly recognized and empowered agents and employees, shortly after the commencement of the Babstrom enlargement herein referred to entered into an informal agreement and understanding with agents and employees of the Pioneer Contracting Company, Inc., and/or the H. B. Blanks Construc-[fol. 82] tion Company, whereby the said company or companies were to conduct its or their clearing operations in such a manner as to save and conserve as much as possible of plaintiff's timber situated in the Babstrom enlargement right of way area; that in accordance with said agreement between plaintiff herein and the said Pioneer Contracting Company, Inc., the said timber situated on right of way was cut, cleared and conserved.

10

In Answer to paragraph Ten, Third-Party Defendant shows that no answer thereto is required. Third-Party Defendant further shows that a copy of said contract will be produced at the trial of this cause.

11

The allegations of paragraph Eleven are denied except as herein admitted, modified or explained.

Further answering said paragraph, Third-Party Defendant shows that the contracts between the H. B. Blanks Construction Company, and the Pioneer Contracting Company, Inc., required the respective contractors to clear the right of way of timber and other vegetation.

Further answering said paragraph, Third-Party Defendant specifically denies that said contracts required the destruction of said timber and avers that said contracts provided only for the removal of said timber from the right of way.

[fol. 83] 12

The allegations of paragraph Twelve are denied.

Further answering said paragraph, Third-Party Defendant shows that this Plaintiff did remove timber from the right of way above referred to in paragraph Nine.

Further answering said paragraph, Third-Party Defendant avers that it gave due and written notice to the record owners of the land on which the timber was situated that the said Babstrom and Ashland levees would be enlarged and that additional rights of way would be required; that under the laws of the State of Louisiana it is only chargeable with a responsibility to give such notice to said land owners, and in no manner is obligated under said laws to notify owners of timber that same might be destroyed or used in the construction or enlargement of levees.

13

In answer to paragraph Thirteen, Third-Party Defendant shows that the allegations contained therein are a conclusion of the pleader, but if an answer is required, same is denied.

Further answering said paragraph Thirteen, Third-Party Defendant alleges that the allegations contained in said paragraph, including the quoting of a communication to the Pioneer Contracting Company, Inc., is a matter personal to the Pioneer Contracting Company, Inc. and which in no manner affects the Third-Party Defendant herein.

[fol. 84]

14

The allegations contained in paragraph Fourteen are denied.

15

In answer to paragraph Fifteen, Third-Party Defendant shows that the allegations contained therein are a conclusion of the pleader, but if an answer is required, same is denied.

16

The allegations of paragraph Sixteen are denied.

Further answering said paragraph, Third-Party Defendant shows that the borrow pits and levees were located in accordance with sound engineering practice and custom.

Further answering said paragraph, Third-Party Defendant shows that the land in the area on which said timber was growing was batture land.

17

The allegations of paragraph Seventeen are denied except as herein admitted, modified or explained.

Further answering said paragraph, Third-Party Defendant shows that the construction of the Babstrom and Ashland levees was undertaken and prosecuted in accordance with the Flood Control Act of May 15th., 1928, as amended.

[fol. 85]

18

The allegations of paragraph Eighteen are admitted.

19

In answer to paragraph Nineteen, Third-Party Defendant denies that it is liable to the plaintiff, the United States of America, or to any other party in the sum of $9,000.00,

or in any sum whatsoever, as the result of the alleged destruction of the timber referred to in plaintiff's complaint.

20

In answer to paragraph Twenty, Third-Party Defendant shows that the allegations contained therein are conclusions of the pleader and require no answer.

Wherefore, Third-Party Defendant prays that upon the trial herein the demands of the plaintiff and/or defendant and Third-Party Plaintiff against the Board of Commissioners for the Fifth Louisiana Levee District, Third-Party Defendant herein, be rejected and disallowed at plaintiff's costs.

Board of Commissioners for the Fifth Louisiana Levee District, By (S.) Thompson L. Clarke, District Attorney and Legal Advisor.

[File endorsement omitted.]

[fol. 86] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION

[File endorsement omitted]

Civil Action No. 2804

GENERAL BOX COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

COMPLAINT—Filed October 19, 1949

Comes General Box Company, a corporation, plaintiff, and files this its complaint against the United States of America, and for its cause of action states:

I

Plaintiff is a corporation chartered, organized and existing under and by virtue of the laws of the State of Delaware

but is qualified to do and is doing business in the State of Louisiana.

II

Jurisdiction of this claim against the United States of America is conferred by section 1346 of the U. S. Code Judiciary and Judicial Procedure, and by section 1402 of said Code.

III

The plaintiff is the owner and actual physical possessor, for more than one year prior to the filing of this suit, of the [fol. 87] timber and timber rights located upon the lands described in the copy of deed attached hereto, marked "Exhibit A", and, as such, made a part hereof as though fully copied herein at length, the timber being situated in Concordia Parish in the State of Louisiana, lying outside of the Mississippi River levee, commonly known as the Babstrom Levee; that is to say, the timber upon that part of the above described land lying between the Babstrom Levee on the west side of the Mississippi River in the State of Louisiana and the banks of the Mississppi River; the plaintiff having acquired the same under and by virtue of a deed, copy of which, as aforesaid, is attached hereto, marked "Exhibit A".

IV

That heretofore during the year 1947, the United States, acting by and through H. B. Blanks Construction Company, a contracting company engaged in levee work, and acting under and by virtue of the authority of the United States, entered upon the said land with bulldozers, draglines and other heavy equipment and wilfully, arbitrarily and wantonly destroyed and demolished the timber belonging to the plaintiff to the value of Nine Thousand Dollars ($9,000.00), all without the knowledge, consent and permission of the plaintiff, and at a time when the said levee contractor well knew or was charged with notice that the plaintiff was the owner of the said timber.

V

The United States also knew or was chargeable with notice and knowledge that the plaintiff was the owner of

[fol. 88] said timber despite which fact the contract with said levee contractor was consummated without notice to the plaintiff and without compliance with the laws and the rules and regulations of both the State and Federal Agencies with respect to such matters, and contrary to the provisions of what is generally known as the Federal Flood Control Act, as amended.

VI

That at the time of the wrongful destruction of said timber, and subsequent thereto, plaintiff was not dealt with either by the contractor or by the government in respect to the said proposed contract as owner of the timber or upon any basis whatever, and that the action of the government in the contract not only specifically violated the provisions of the said Flood Control Act and all regulations adopted by the United States Army Engineers and other Federal agencies in reference thereto; but violated also all customs and regulations of the Levee Boards of the State of Louisiana and all other State agencies exercising authority in reference to the subject-matter of the said levee contract.

VII

Plaintiff does not have a copy of the said contract between the United States of America and the said H. B. Blanks Construction Co., Inc., for the construction of said Item M-343-R, A. B. and C., Babstrom Levee, Lower Tensas, Concordia Parish, Louisiana, for the enlargement of the Babstrom Levee; and said contract is within the exclusive [fol. 89] knowledge and possession of the United States of America and the H. B. Blanks Construction Co.; and the plaintiff calls upon the defendant to have and produce the said contract and to make delivery of same and to file the same with its answer to this complaint.

VIII

In respect thereto, the plaintiff shows, on information and belief, that all acts committed by the H. B. Blanks Construction Co. in fulfillment of its obligations under the said contract were not only specifically carried out with the knowledge, consent and approval of the United States En-

gineers having authority in the premises, but that the said contract specifically anticipated that the said timber was to be destroyed totally rather than that he plaintiff, as the owner thereof, was to be afforded a reasonable opportunity to salvage the value of said timber by cutting the same prior to the carrying out of the said construction contract.

IX

That the plaintiff was given no notice of any kind, and was afforded no opportunity to cut and remove the said timber.

X

Plaintiff shows that the area where the said wrongful appropriation was committed is isolated, and that plaintiff had no knowledge thereof until after a large portion of said timber had been destroyed.

[fol. 90]

XI

That the destruction of said timber was the taking of said timber, the property of plaintiff, within the meaning of the Fifth Amendment of the Federal Constitution, and the plaintiff, as owner, is entitled to compensation for the full and true value thereof.

XII

Plaintiff further shows that the area in which the said timber was located is of a nature where borrowpits could have been easily located affording adequate soil and dirt for the purpose of said construction contract without involving said timber in any way whatever; and plaintiff further shows that in this area, the levee which was increased in size by the said contract is approximately one mile from the Mississippi River; and that the area where the said timber was located is not regularly subject to overflow, dependent upon the seasonal rise and fall of the said Mississippi River; and that the said area is outside of and beyond the banks of the River and is in no true sense batture.

XIII

That the contract aforesaid was executed under the said Flood Control Act, as amended, under the provisions of which no local contributions of any kind were expected; but that in any event and whatever test of local law or custom is applied, that the destruction of said timber was not the exercise of any local contributions or of any riparian servitude of any kind or character, either State or Federal; and [fol. 91] that it, in any event, represented no more or less than a reckless and unnecessary destruction of said timber, the practical effect of which could have been readily avoided, if plaintiff had been properly notified and afforded a reasonable opportunity to cut and remove the timber as it was willing to do.

XIV

That the said project was a part of an over-all Flood Control program involving the whole of the lower Mississippi River; and that it was in no sense an emergency project.

XV

Plaintiff brings this its suit against the United States in the venue where the said wrongful appropriation was committed, and for the loss sustained and the damage it suffered, all in the sum of Nine Thousand Dollars ($9,000.00); and plaintiff asks judgment in the sum of $9,000.00, together with all interest and costs.

Further for general and equitable relief in the premises.

Carl G. Chatwick, Natchez, Mjssissippi; Fred G. Benton, Baton Rouge, Louisiana; Barnett, Barnett & Jones, Attorneys for Plaintiff, 414½ East Capitol Street, Jackson, Mississippi.

[fol. 92] EXHIBIT A TO COMPLAINT

STATE OF LOUISIANA,
Parish of Concordia:

Be It Known and Remembered that on this day, before me, the undersigned Notary Public, duly commissioned and

qualified in and for said Parish and State, there personally came and appeared R. B. Sharp, a widower, and a resident of Natchez, Mississippi, who declared to me, Notary, in the presence of the two undersigned, competent witnesses, that he does, by these presents, sell, transfer, convey and deliver, with full warranty of title and with complete subrogation as to all rights of action in warranty against all former owners, unto the General Box Company, Inc., a Delaware corporation, having its principal place of business in Chicago, Cook County, Illinois, with plant located at Natchez, Miss., all of the following described property situated in Concordia Parish, Louisiana, to-wit:

All timber, except pecan, situated, lying or being upon the following described property, Measuring for cottonwood and willow 18 inches across the stump between the bark, measured 16 inches from the ground at the time of cutting and all other timber measuring 16 inches across the stump, measured 16 inches from the ground at the time of cutting, situated on the following described property, to-wit:

All of Excelsior and Home Place Plantations situated in Sections 12, 13, 14, 15, 16 and 17, T. 4 N., R. 9 E., in Concordia Parish, La., lying on the riverside of U. S. Public Levee, and between said levee and the Mississippi River, and bounded on the Upper side by Point Pleasant Plantation and accretions thereto belonging to R. M. Stricker [fol. 93] and R. B. Sharp, and on the lower side by Ashland Plantation and accretions thereto belonging to A. B. Learned and Mrs. L. L. Metcalfe. Said Upper and Lower lines having been established by boundary agreement between the parties.

To Have and To Hold said timber unto said purchaser, its successors and assigns, forever.

The price and consideration for which said sale is made is the sum of Thirty-Six Thousand and No/100 ($36,000.00) Dollars, cash in hand paid, receipt of which is hereby acknowledged and a full acquittance granted therefor.

It being understood that the vendee is to have ten years from the date of this deed for the removal of said timber; and at the end of said period, all timber not cut and removed is to revert to the vendor. And the vendee is to

have full right of ingress and egress over said property for removal of said timber.

The tax certificate and mortgage certificate required by law are waived and me, Notary, held harmless for the non-production of the same.

In Evidence Whereof, said appearer has signed this act at my office in the presence of me, Notary, and Dorothy J. McLemore and Anna E. Calhoun, the two undersigned, competent witnesses, who sign as such, on this the 9th day of April, 1947, after due reading of the whole act.

R. B. Sharp, John Dale, Jr., Notary Public. (Seal.)

Witnesses: Dorothy J. McLemore, Anna E. Calhoun.

[fol. 94] In United States District Court

Motion to Dismiss—Filed December 19, 1949

Civil Action No. 2804

Now comes the United States of America, through the undersigned counsel, and pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure respectfully moves the Court to dismiss the complaint filed herein for the following reasons:

1

This Court is without jurisdiction of the matters and things of which plaintiff complains and is without jurisdiction to render judgment in favor of the plaintiff and against the defendant herein because the complainant, General Box Company, Inc., is not domiciled in the Western District of Louisiana.

2

The complaint fails to state a claim upon which relief can be granted as it shows on its face that the work being done at the time of the alleged damage was under a contract between United States of America and H. B. Blanks Construction Company for the construction of the Bab-

strom Leeve along the west bank of the Mississippi River, but does not show that the timber involved in this suit was assessed the preceding year which is, under Louisiana law, a necessary allegation in a suit for damages to recover a loss by cutting, destruction or damage to timber in locating, constructing or improving a levee.

[fol. 95] (S.) Malcolm E. LaFargue, United States Attorney. (S.) William J. Fleniken, Assistant United States Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

WAIVER OF QUESTION OF VENUE IN MOTION TO DISMISS—Filed August 15, 1950

Civil Action No. 2804

Now comes defendant, United States of America, through undersigned counsel, and withdraws the question of venue set forth in Paragraph One of its Motion to Dismiss which has been filed in the above captioned matter, reading as follows:

"This Court is without jurisdiction of the matters and things of which plaintiff complains and is without jurisdiction to render judgment in favor of the plaintiff and against the defendant herein because the complainant, General Box Company, Inc., is not domiciled in the Western District of Louisiana."

[fol. 96] The remaining grounds of dismissal set forth in defendant's Motion to Dismiss are hereby specifically reserved.

(S.) Wm. J. Fleniken, United States Attorney.
(S.) Sol B. Pressburg, Special Attorney, Department of Justice.

[File endorsement omitted.]

That the plaintiff was given no notice of any kind, and was afforded no opportunity, to cut and remove the said timber.

13

Plaintiff shows that the area where said wrongful appropriation was committed is isolated and that plaintiff had no knowledge thereof until after the said timber had been destroyed, and that on or about the 25th day of August, 1948, plaintiff, through attorneys, directed a communication to the Pioneer Contracting Co., Inc., and the General Accounting Office of the United States of America, in words and figures as follows:

"August 25, 1948.

Pioneer Construction Company, Inc. 453 Plum Avenue, Memphis, Tennessee.

General Accounting Office, U. S. of America, Reconciliation & Claims Division, Washington 25, D. C.

[fol. 36] Gentlemen:

The General Box Company of Natchez, Mississippi, has employed Mr. Carl Chadwick, attorney of Natchez, Mississippi, and our firm, in its claim against you for the destruction of certain timber located between the Babstrom Levee and the Mississippi River, in Concordia Parish, Louisiana.

The Pioneer Construction Company did this damage in the performance of Items D and E under Contract F-343-H, on Babstrom Levee, in the lower Tensas levee district, Concordia Parish, Louisiana.

This timber, as stated above, was between the levee and the Mississippi River. The General Box Company acquired the property under a deed dated October 17, 1946, recorded in CRD-3 page 329, Concordia Parish. On November 27, 1946, The General Box Company sold the realty to Orrin James, but retained the timber with removal period of twenty years. This latter deed is recorded in the same parish, in CRD-3, at page 460.

The General Box Company was given no notice whatever that the contractor was going onto the said land, and had

no oppo unity whatsoever to salvage any timber from this tract.

It is our opinion that the claim of the General Box Company has merit to it, and that the box company is entitled to the damages for the needless destruction and demolition of its timber.

Our instructions are to file suit for the damages, but if you are inclined to enter into amicable negotiations, work-[fol. 37] ing toward a settlement of the claim, we will be glad to withhold filing the suit, provided you let us hear from you within the course of the next few days.

Respectfully yours, Barnett, Barnett & Jones, by (S.) P. Z. Jones.

PZJ :dej"

14

That the wrongful destruction of said timber was a continuous action on the part of the said contractor, which was not completed in compliance with the provisions of said contract until within one year of the bringing of this action.

15

That the destruction of said timber was the taking of said timber, the property of the plaintiff, within the meaning of the Fifth Amendment to the Federal Constitution; and plaintiff as owner is entitled to compensation for the full and true value thereof.

16

Plaintiff shows further that the area in which the said timber was located is of a nature where bar pits could have been easily located affording adequate soil and dirt for the purposes of said construction contract without involving the said timber in any way whatever, and plaintiff further shows that in this area the levee which was increased in [fol. 38] size by the said contract is approximately one mile from the Mississippi River, and that the area where the said timber was located is not regularly subject to overflow dependent upon the seasonal rise and fall of the

said Mississippi River, and that the said area is outside of and beyond the banks of the river and is in no true sense batture.

17

That the said contract was executed under the said Flood Control Act, as shown, as amended, under the provisions of which no local contributions of any kind were expected, but that in any event and whatever test of local law or custom is applied that the destruction of said timber was not the exercise of any local contribution or of any riparian servitude of any kind or character, either state or federal, and that it in any event represented no more or less than a reckless and unnecessary destruction of the said timber, the practical effect of which could have been readily avoided if plaintiff had been properly notified and afforded a reasonable opportunity to cut and remove the said timber as it was willing to do.

18

That the said project was a part of an over-all flood control program involving the whole of the lower Mississippi River, and that it was in no sense an emergency project.

19

Plaintiff brings this its suit jointly and severally and in solido against the said Pioneer Contracting Co., Inc., and [fol. 39] the United States of America in the venue where the said wrongful appropriation was committed and for the loss sustained and the damage it suffered, all in the sum of $9,000.00, by the acts of the defendants acting jointly and severally and in solido, and plaintiff asks judgment jointly and severally and in solido in the sum of $9,000.00, or in the alternative asks judgment severally and in solido against each or either of the defendants for the said sum of $9,000.00, together with interest and costs.

20

Plaintiff demands a trial by jury as to all issues with the Pioneer Contracting Co., Inc., and for trial as to the

United States of America by the Court, as is allowed under the statutes hereby invoked in respect to the United States.

Further for general and equitable relief in the premises.

Carl C. Chadwick, Natchez, Mississippi; Fred G. Benton, Baton Rouge, Louisiana; Barnett, Barnett & Jones, by P. Z. Jones, Attorneys for Plaintiffs, 414½ East Capitol Street, Jackson, Mississippi.

[fols. 40-43] EXHIBIT "A" TO AMENDED COMPLAINT

Omitted. Printed side page. 15 ante.

[fols. 44-54] EXHIBIT "B" TO AMENDED COMPLAINT

Omitted. Printed side page. 19 ante.

[fol. 55] CERTIFICATE OF SERVICE (omitted in printing)

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BY UNITED STATES AND PIONEER CONTRACTING COMPANY, INC.—Filed April 20, 1949

Civil Action No. 2536

Now comes the United States of America and the Pioneering Company, Inc. through their attorneys, Malcolm E. Lafargue, United States Attorney, and William J. Flenniken, Assistant United States Attorney, for the Western District of Louisiana, and pursuant to Rule 12(b) of the Federal Rules of Civil Procedure respectfully move the Court to dismiss the complaint filed herein for the following reasons:

[fol. 56] 1

This court is without jurisdiction of the matters and things of which plaintiffs complain, and is without jurisdic-

tion to render judgment in favor of the plaintiffs and against the defendants herein because:

(a) The defendant, United States of America, has not consented to be joined and therefore cannot be joined as a party with other individuals in a single cause of action.

(b) The complainant, General Box Company, Inc., is not domiciled in the Western District of Louisiana.

2

The complaint fails to state a claim upon which relief can be granted as it shows on its face that the work being done at the time of the alleged damage was under a contract between the United States of America and the Pioneer Contracting Company for enlargement of the Bastrom Levee along the west banks of the Mississippi River, but does not show that the timber involved in this suit was assessed the preceding year which is, under Louisiana law, a necessary allegation in a suit for damages to recover for the loss by cutting, destruction, or damage to timber in locating, constructing, or improving a levee.

(S.) Malcolm E. Lafargue, United States Attorney;
(S.) Wm. J. Fleniken, Assistant United States Attorney.

[fol. 57] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

WAIVER OF QUESTION OF VENUE IN MOTION TO DISMISS—Filed August 15, 1950

Civil Action No. 2536

Now comes the United States of America and the Pioneer Contracting Company, Inc., through undersigned counsel, and withdraws the question of venue set forth in Section (b) of Paragraph One of the Motion to Dismiss the complaint in the above entitled action, reading as follows:

"This Court is without jurisdiction in the matters and things of which plaintiff complains and it is without jur-s-

diction to render judgment in favor of the plaintiff and against the defendants herein because (b) the complainant, General Box Company, Inc., is not domiciled in the Western District of Louisiana".

The remaining grounds of dismissal set forth in defendants' Motion to Dismiss are hereby specifically reserved.

(S.) Wm. J. Flenniken, United States Attorney. (S.) Sol B. Pressburg, Special Attorney, Department of Justice.

[fol. 58] [File endorsement omitted.]

In United States District Court

Motion to Dismiss as to Pioneer Contracting Company, Inc.—Filed October 4, 1950

Civil Action No. 2536

Now comes the General Box Company, plaintiff by its attorneys of record, and moves the Court for leave to dismiss as to the Pioneer Contracting Company, Inc.

Fred G. Benton, Baton Rouge, Louisiana. Carl A. Chadwick, Natchez, Mississippi. Barnett, Jones and Montgomery, Jackson, Mississippi. Plaintiff's Attorneys, By (S.) P. Z. Jones, Of Counsel.

[File endorsement omitted.]

[fol. 59] In United States District Court

Order Dismissing Cause as to Pioneer Contracting Co., Inc.—October 4, 1950

Civil Action No. 2536

On motion of the plaintiff, it is ordered and adjudged that this cause be and the same is hereby dismissed as to the Pioneer Contracting Company, Inc.

Ordered and Adjudged on this October 4th, 1950.

(S.) Ben C. Dawkins, United States District Judge.

Approved: Fred G. Benton, Carl A. Chadwick, Barnett, Jones & Montgomery, By (S.) P. Z. Jones, Attorney for Plaintiff. (S.) Wm. J. Fleniken, Asst. U. S. Atty., Attorneys for Defendants.

[File endorsement omitted.]

[fol. 60] IN UNITED STATES DISTRICT COURT

COURT'S OPINION ON MOTIONS TO DISMISS—December 28, 1950

Civil Action Nos. 2536 and 2804 (Consolidated)

For Plaintiff: Messrs. Fred G. Benton, Louisiana Natl. Bk. Bldg., Baton Rouge, Louisiana, Carl C. Chadwick, Natchez, Mississippi. Barnett, Barnett & Jones, 414½ E. Capitol St., Jackson, Mississippi. Jackson B. Davis, 408 Slattery Bldg., Shreveport, Louisiana.

For Defendant: Harvey L. Carey, William J. Fleniken, Shreveport, Louisiana.

DAWKINS, J.:

In these two cases the same plaintiff sues, in the first, the United States and Pioneer Contracting Co., Inc. (called Pioneer), and in the second, the Government alone, for the value of timber alleged to have been owned by plaintiff apart from the land and which was destroyed in the process of building or repairing levees on the Mississippi River.

In both cases, motions to dismiss, on substantially the same grounds, were filed, save in the first there was the additional contention that the Government could not be joined as a defendant with Pioneer. Thereafter, the plaintiff was allowed to dismiss its complaint as to this defendant. Otherwise, the grounds of the motions to dismiss are:

[fol. 61] (1) That plaintiff was not domiciled in the Western District of Louisiana. (This plea to the jurisdiction was by agreement of counsel waived); and

(2) The petition does not state a claim upon which relief

can be granted, including the contention there can be no recovery for the timber because it was not assessed for taxes by the State of Louisiana and its subdivisions.

Counsel for the Government concedes that private persons are permitted to sue the United States in two types of cases: (1) Subsection (a) of Section 1346, Title 28 USC (The Tucker Act); and (2) Subsection (b) of Section 921 et seq., Title 28 USC (The Federal Tort Claims Act); but claim these demands fall into neither category, but are controlled by the provisions of Section 702(c) of Title 33, USC (The Flood Control Act). In Tilden v. United States, 10 Fed. Supp. 377, this Court held that a plaintiff similarly situated was entitled to recover the value of the property destroyed, in spite of the provisions of the State Constitution of 1921 (Article XVI, Section 6), which limits the recovery to the assessed value of the property "used or destroyed." However, it is sought to distinguish the present cases on the grounds that in the Tilden case, supra, (1) the plaintiff was the owner of the land taken for levee purposes to be turned over to the state "without costs", except that the latter was to maintain and keep in repair said levees, while here the plaintiff owns the timber alone; (2) that the Government was enlarging the levee, which necessarily admits that the State or Levee Board "was owner thereof", and that the latter "had already either appropriated or [fol. 62] expropriated the right-of-way for the levee," which makes it "obvious that the United States, when it performed this work, was the agent of the owner of the levee"; and (3) that under Section 702 (c) of Title 33 USC (The Flood Control Act of 1928, as amended), there can be no expenditure for the purpose here sought "except when authorized by the Secretary of the Army upon the recommendation of the Chief of Engineers," or "until the state or levee district has given assurance satisfactory to the Secretary of the Army that they will * * * (c) provide without cost to the United States all rights-of-way for levee foundations and levees on the main stream of the Mississippi River between Cape Girardaux and the Head of Passes."

Attention is also directed by counsel for the Government to the decision of the State Supreme Court in Dickson v.

Board of Commisssioners of Caddo Levee District, 26 So. (2d) 474), wherein the obligations or servitudes resting upon riparian lands on a navigable stream were discussed, and in which it was held that the failure of a plaintiff to allege that the property used or destroyed had been assessed for taxes for the preceding year and the amount thereof "discloses no cause of action." In the case thus cited, it is true that the Supreme Court of the State went at length into the history, jurisprudence, statutory and constitutional law of the State of Louisiana as they affect the rights of owners of property fronting on a navigable stream, as well as the nature of the servitude in favor of the public with respect to levees, public roads, etc., prior to the Constitution of 1921. It pointed out correctly that prior to the incorporation of Section 6, Article XVI, in the State Constitution, the riparian owner, outside of the [fol. 63] Parish of Orleans, was without recourse when his property was taken for those purposes. However, the Court affirmatively found that property was "used or destroyed for levee purposes within the contemplation of this provision of the Constitution of 1921, and is therefore compensable in accordance with the provisions of Section 6, i.e., at a price not to exceed the assessed value for the year preceding * * *," but that the plaintiff "having failed to allege" that it had been so assessed "discloses no cause of action," citing the Court's earlier decision of Lacour v. Red River, etc., 158 La. 737, 104 So. 636. However, in the present case the plaintiff bases its right to sue the Government on the provisions of both the Tucker and the Federal Tort Acts. It claims compensation under the Flood Control Act of 1928, as amended, and not the law of the state. Whether it will be able to establish a right of recovery as on an implied promise under the Tucker Act, or for tort (Subsection (b) of Section 921, Title 28 USC), will depend upon the facts proven at the trial. Plaintiff points out that in neither case does the claim amount to $10,000, the minimum under the Tucker Act.

As held in the Tilden case, supra, it is believed complainant alleges a cause of action which should be tried on its merits.

The motions to dismiss will be overruled.

Thus Done and Signed, in chambers, at Monroe, Louisiana, on this 28 day of December, 1950.

(S.) Ben C. Dawkins, U. S. District Judge.

[fol. 64] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION

Civil Action No. 2536

GENERAL BOX COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA and PIONEER CONTRACTING COMPANY, INC., Defendants

MOTION AND ORDER BRINGING IN THIRD PARTY DEFENDANT—January 13, 1951

Now comes the United States of America, one of the defendants in the above entitled cause, before service of its answer and moves for leave to make the Board of Commissioners for the Fifth Louisiana Levee District, with official domicile in the City of Tullulah, Parish of Madison, State of Louisiana, parties to this action and that it be served with the summons and third party complaint as set forth in Exhibit "A" hereto attached.

Wm. J. Flemiken, Assistant United States Attorney.
Sol. B. Pressburg, Special Attorney, Department of Justice.

[fol. 65] ORDER

In the above numbered and entitled cause let the Board of Commissioners for the Fifth Louisiana Levee District be made parties to this action and let it be served with summons and third party complaint in accordance with defendants above and foregoing motion.

Thus done and signed at Monroe, Louisiana, this the 13 day of January, 1951.

Ben C. Dawkins, United States District Judge.

EXHIBIT "A" TO MOTION

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION

Civil Action No. 2536

GENERAL BOX COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant and Third Party Plaintiff, and Pioneer Contracting Company, Inc., Defendant,

vs.

BOARD OF COMMISSIONERS FOR THE FIFTH LOUISIANA LEVEE DISTRICT, Third Party Defendant

Third Party Complaint

1

Plaintiff, General Box Company, has filed against the United States of America and Pioneer Contracting Com- [fol. 66] pany, Inc., a complaint, a copy of which is attached hereto as Exhibit "B".

2

The alleged damages which the plaintiff complains of all occurred as follows: The Board of Commissioners for the Fifth Louisiana Levee District, by resolution adopted on 15th June, 1929, agreed to provide, without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River to protect the lands within said levee District, which, included the Babstrom Levee, from destructive overflows from said River; that in further pursuance of said agreement, the Board of Commissioners for the Fifth Louisiana Levee District ap-

propriated the right of way for the enlargement of said Babstrom Levee and thereafter made such right of way available to the United States, to enter thereon, to remove the timber therefrom and to excavate therefrom such materials as were necessary for the construction of said Levee; that acting upon the authority of the Board of Commissioners for the Fifth Louisiana Levee District, and its agreement as aforesaid, the United States through its construction contractor, Pioneer Contracting Company, Inc., proceeded to construct the Babstrom Levee.

3

That as hereinabove set forth, the Board of Commissioners for the Fifth Louisiana Levee District agreed to provide without cost to the United States all right of way for levee foundations and levees on the main stem of the [fol. 67] Mississippi River and having assured the United States that the right of way for the Babstrom Levee was available for the United States to enter thereon for the purpose of constructing said Levee renders the Board of Commissioners for the Fifth Louisiana Levee District to be made third parties defendant, liable for all sums that may be adjudged against the defendant, United States of America, in favor of plaintiff, General Box Company.

Wherefore, premises considered, the defendant, United States of America, prays judgment against the Board of Commissioners for the Fifth Louisiana Levee District, third party defendant herein, for all sums that may be adjudged against the defendant, the United States of America, in favor of the plaintiff, General Box Company, and for general and equitable relief.

Wm. J. Fleniken, Assistant United States Attorney,
Sol B. Pressburg, Special Attorney, Department of Justice.

[fol. 68] IN UNITED STATES DISTRICT COURT

ANSWER—Filed January 18, 1951

Civil Action No. 2536

Now comes the United States of America, defendant in the above styled cause of action and, reserving all rights heretofore asserted in motions previously filed, answers plaintiff's complaint as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted in that:

1. The acts and things complained of are discretionary acts for which the United States is not liable under the provisions of subsection (a) of Section 2680, Title 28, U.S.C.A.

2. The work on the Babstrom Levee Project, where this damage is alleged to have occurred, was performed by the Pioneer Contracting Company, Inc., under a contract with the United States of America, and the United States is not responsible for the acts of the contractor. (Section 2671, Title 28, U.S.C.A.)

Second Defense

Defendant affirmatively shows that plaintiff had knowledge of the fact that the Babstrom Levee would be enlarged prior to the time the work was actually begun and knowledge that some timber would necessarily be, and as the work progressed was being, damaged and destroyed in order to [fol. 69] perform this work, and having failed to take action necessary to avoid or minimize its loss and damage to its timber in that area, is now estopped to recover damages therefor.

Third Defense

1

Defendant admits the allegation in paragraph 1 of the complaint.

2

In answer to paragraph 2, respondent is not called upon to admit or deny the allegations in said paragraph as same

pertain solely to the status of the Pioneer Contracting Company, Inc.

3

In answer to paragraph 3, respondent is not called upon to admit or deny the allegations in said paragraph as same pertain solely to the status of the Pioneer Contracting Company, Inc.

4

In answer to paragraph 4 of the complaint, the matters therein alleged being conclusions of law, your respondent is not called upon to either admit or deny, but if called upon to do so, then same are denied.

[fol. 70]

5

Defendant admits the allegations in paragraph 5 of the complaint.

6

Defendant admits the allegations in paragraph 6 of the complaint.

7

The allegations of paragraph 7 are denied, except as may be herein admitted, modified or explained.

Further answering said paragraph 7, your respondent admits that the Pioneer Contracting Company, Inc., acting under the authority and under the provisions of the contract with the United States of America, entered upon the said lands with equipment and machinery necessary for the clearing of the right of way for the Babstrom Levee, but denies that the Pioneer Contracting Company, Inc., willfully, arbitrarily, and wantonly destroyed any timber belonging to said plaintiff and expressly denies that it is liable to plaintiff in any amount for timber on said lands destroyed, demolished or damaged in the clearing or construction of the Babstrom Levee.

Further answering said paragraph 7 of the complaint, defendant denies that it is indebted unto this plaintiff in the sum of $9,000.00, or any sum whatsoever.

[fol. 71] 8

In answer to paragraph 8, defendant denies the allegations contained therein, except as herein admitted, modified or explained.

Further answering said paragraph, defendant shows that the right of way for Babstrom Levee was appropriated by the Board of Commissioners for the Fifth Louisiana Levee District with official domicile in the City of Tallulah, State of Louisiana, and thereafter the United States was authorized to enter thereon and construct said Levee, which construction included the clearing and removal of the timber and other vegetation from the right of way. Defendant expressly denies that the appropriation of the right of way by the Board of Commissioners for the Fifth Louisiana Levee District, as aforesaid, was contrary to the laws, rules and regulations of the State and Governmental Agencies, with respect to such matters, and further denies that the appropriations of the right of way was contrary to the Flood Control Acts of the United States.

9

In answer to paragraph 9, the allegations contained therein are denied, except as admitted, modified or explained in the preceding paragraph 8 hereof.

10

In answer to paragraph 10, defendant shows that no answer thereto is required. Defendant further shows that a [fol. 72] copy of the contract will be produced at the trial of this cause.

11

The allegations of paragraph 11 are denied, except as herein admitted, modified or explained.

Further answering said paragraph defendant shows the contract between Pioneer Contracting Company, Inc., required the contractor to clear the right of way of timber and other vegetation.

Further answering said paragraph defendant specifically denies that said contracts required the destruction of said

timber and avers that said contract provided only for the removal of said timber from the right of way.

12

The allegations of paragraph 12 are denied.

Further answering said paragraph, defendant shows that this plaintiff did remove timber from the right of way.

13

In answer to paragraph 13, the allegations thereof are denied.

14

Answering paragraph 14, of the complaint, the allegations thereof are denied.

[fol. 73]

15

In answer to paragraph 15, defendant shows that the same is a conclusion of law and therefore needs no answer, but if an answer is required, the same is denied.

16

The allegations of paragraph 16 are denied.

Further answering said paragraph, defendant shows that the borrow pits and levees were located in accordance with sound engineering practice and custom.

17

The allegations of paragraph 17 are denied, except as herein admitted, modified or explained.

Further answering said paragraph, the defendant shows that the construction of the Babstrom Levee was undertaken and prosecuted in accordance with the Flood Control Act of May 15, 1928, as amended.

18

The allegations of paragraph 18 are admitted.

In United States District Court

Motion to Bring in Third Party Defendant and Order—January 13, 1951

[Title omitted]

Civil Action No. 2804

Now comes the United States of America, the defendant in the above entitled cause, before service of its answer and moves for leave to make the Board of Commissioners for the Fifth Louisiana Levee District, with official domicile in the City of Tallulah, Parish of Madison, State of Louisiana, parties to this action and that it be served with [fol. 97] the summons and third party complaint as set forth in Exhibit "A" hereto attached.

Wm. J. Fleniken, Assistant United States Attorney, Sol S. Pressburg, Special Attorney, Department of Justice.

Order

In the above numbered and entitled cause let the Board of Commissioners for the Fifth Louisiana Levee District be made parties to this action and let it be served with summons and third party complaint in accordance with defendants above and foregoing motion.

Thus done and signed at Monroe, Louisiana, this the 13 day of January, 1951.

Ben C. Dawkins, United States District Judge.

[fol. 98] EXHIBIT "A" TO MOTION

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION

Civil Action No. 2804

GENERAL BOX COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA, DEFENDANT AND THIRD PARTY, Plaintiff,

vs.

BOARD OF COMMISSIONERS FOR THE FIFTH LOUISIANA LEVEE DISTRICT, THIRD PARTY, Defendant

Third Party Complaint

1

Plaintiff, General Box Company, has filed against the United States of America a complaint, a copy of which is attached hereto as Exhibit "B".

2

The alleged damages which the plaintiff complains of all occurred as follows: The Board of Commissioners for the Fifth Louisiana Levee District, by resolution adopted on 15th June, 1929, agreed to provide, without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River to protect the lands within said Levee District, which included the Babstrom and Ashland Levees, from destructive overflows from said River; that in further pursuance of said agreement, the Board of Commissioners for the Fifth Louisiana Levee District appropriated the [fol. 99] rights of way for the enlargement of said Babstrom and Ashland Levees and thereafter made such rights of way available to the United States, to enter thereon, to remove the timber therefrom and to excavate therefrom such materials as were necessary for the construction of said levees; that acting upon the authority of the Board

of Commissioners for the Fifth Louisiana Levee District, and its agreement as aforesaid, the United States through its construction contractors, H. B. Blanks Construction Company and Pioneer Contracting Company, Inc., proceeded to construct the Babstrom and Ashland Levees.

3

That as hereinabove set forth, the Board of Commissioners for the Fifth Louisiana Levee District agreed to provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River and having assured the United States that the rights of way for the Babstrom and Ashland Levees were available for the United States to enter thereon for the purpose of constructing said Levees renders the Board of Commissioners for the Fifth Louisiana Levee District to be made third parties defendant, liable for all sums that may be adjudged against the defendant, United States of America, in favor of plaintiff, General Box Company.

Wherefore, premises considered, the defendant, United States of America, prays judgment against the Board of Commissioners for the Fifth Louisiana Levee District, third party defendant herein, for all sums that may be adjudged against the defendant, the United States of [fol. 100] America, in favor of the plaintiff, General Box Company, and for general and equitable relief.

William J. Fleniken, Assistant United States Attorney; Sol B. Pressburg, Special Attorney, Department of Justice.

In United States District Court

Answer—Filed January 18, 1951

Civil Action No. 2804

Now comes the United States of America, defendant in the above styled cause of action and, reserving all rights

heretofore asserted in motions previously filed, answers plaintiff's complaint as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted in that:

1. The acts and things complained of are discretionary acts for which the United States is not liable under the provisions of sub-section (a) of Section 2680, Title 28, U.S.C.A.

[fol. 101] 2. The work on the Babstrom Levee Project, where this damage is alleged to have occurred, was performed by the Pioneer Contracting Company, Inc., under a contract with the United States of America, and the United States is not responsible for the acts of the contractor. (Section 2671, Title 28, U. S. C. A.)

Second Defense

Defendant affirmatively shows that plaintiff had knowledge of the fact that the Babstrom Levee would be enlarged prior to the time the work was actually begun and knowledge that some timber would necessarily be, and as the work progressed was being, damaged and destroyed in order to perform this work, and having failed to take action necessary to avoid or minimize its loss and damage to its timber in that area, is now estopped to recover damages therefor.

Third Defense

I

The defendant admits the allegations contained in Paragraph I.

II

In answer to paragraph II, the matters contained therein are conclusions of law and the defendant is not called upon either to admit or deny, but if called upon to do so, then same are denied.

[fol. 102] III

The defendant admits the allegations contained in paragraph III.

IV

The defendant denies the allegations contained in Paragraph IV, except as herein admitted, modified and explained.

Further answering said paragraph defendant shows H. B. Blanks Construction Company and Pioneer Contracting Company, Inc. under contracts with the United States, entered upon the said lands with equipment and machinery necessary for the clearing of the right of way for the Babstrom and Ashland Levees and cleared the growing timber and other vegetation from such land as was necessary to secure earth for the construction of the Babstrom and Ashland Levees. Defendant expressly denies that the H. B. Blanks Construction Company and/or Pioneer Contracting Company, Inc., willfully, arbitrarily and wantonly destroyed any timber belonging to the plaintiff and expressly denies that the defendant is liable to the plaintiff for timber to the value of $9,000.00 or in any amount whatsoever.

V

In Answer to paragraph V, defendant denies the allegations contained therein, except as herein admitted, modified or explained.

[fol. 103] Further answering said paragraph, defendant shows that the right of way for the Babstrom and Ashland Levees was appropriated by the Board of Commissioners for the Fifth Louisiana Levee District, with official domicile in the City of Tallulah, State of Louisiana, and thereafter the United States was authorized to enter thereon and construct said Levees, which construction included the clearing and removal of the timber and other vegetation from the right of way, Defendant expressly denies that the appropriation of the right of way by the Board of Commissioners for the Fifth Louisiana Levee District, as aforesaid, was contrary to the laws, rules and regulations of the State and Governmental Agencies, with respect to such matters, and

further denies that the appropriation of the right of way was contrary to the Flood Control Acts of the United States.

VI

In answer to paragraph VI, the allegations contained therein are denied except as admitted, modified or explained in the preceding paragraph V hereof.

VII

In answer to paragraph VII, defendant shows that no answer thereto is required. Defendant further shows that a copy of the contract will be produced at the trial of this cause.

VIII

The allegations of paragraph VIII are denied, except as herein admitted, modified or explained.

[fol. 104] Further answering said paragraph, defendant shows that the contracts between H. B. Blanks Construction Company and Pioneer Contracting Company, Inc., required the respective contractors to clear the right of way of timber and other vegetation.

Further answering said paragraph, defendant specifically denies that said contracts required the destruction of said timber and avers that said contracts provided only for the removal of said timber from the right of way.

IX

The allegations of Paragraph IX are denied. Further answering said paragraph, defendant shows that this plaintiff did remove timber from the right of way.

X

In answer to paragraph X, your defendant shows that the allegations therein contained are a conclusion of the pleader, but if an answer is required same is denied.

XI

In Answer to Paragraph XI, defendant shows that the allegations therein contained are conclusions of the pleader and require no answer.

[fol. 105]

XII

The allegations of paragraph XII are denied.

Further answering said paragraph, defendant shows that the borrow pits and levees were located in accordance with sound engineering practice and custom.

XIII

The allegations of paragraph XIII are denied, except as herein admitted, modified or explained.

Further answering said paragraph, defendant shows that the construction of the Babstrom and Ashland Levees was undertaken and prosecuted in accordance with the Flood Control Act of May 15, 1928, as amended.

XIV

The allegations of paragraph XIV are admitted.

XV

Answering paragraph XV, defendant denies that it is liable to the plaintiff in the sum of $9,000.00, or in any sum whatsoever.

[fol. 106] Wherefore, defendant prays that upon trial herein the demands of the plaintiff be rejected and disallowed at his costs.

——— ———, United States Attorney; (S.) William J. Fleniken, Assistant United States Attorney. (S.) Sol B. Pressburg, Special Attorney, Department of Justice.

[File endorsement omitted.]

In United States District Court

Motion to Dismiss—Filed February 15, 1951

Civil Action No. 2804

Third-Party Defendant moves the Court as follows:

To dismiss the action because the complaint fails to state a claim against third-party defendant upon which relief can be granted.

(S.) Thompson L. Clarke, District Attorney, Sixth Judicial District, State of Louisiana, and Legal Advisor for said Third-Party Defendant.

[fol. 107] [File endorsement omitted.]

In United States District Court

Answer of Third-Party Defendant—Filed July 23, 1951

Civil Action No. 2804

Now comes the Board of Commissioners for the Fifth Louisiana Levee District, made Third-Party Defendant in the above styled cause of action and, reserving all rights heretofore asserted in motions and/or exceptions previously filed, answers plaintiff's and Third-Party Plaintiff's complaint as follows, to-wit:

First Defense

The complaints fail to state a claim on which relief can be granted cause in that:

1. The acts and things complained of are discretionary acts for which the United States of America and/or the Board of Commissioners for the Fifth Louisiana Levee District are not liable under the provisions of subsection (a) of Section 2680, Title 28, U.S.C.A.

2. The work on the Babstrom Levee Project, where this damage is alleged to have occurred, was performed by the Pioneer Contracting Company, Inc., under a construction

contract with the United States of America, and the United [fol. 108] States of America and/or the Board of Commissioners for the Fifth Louisiana Levee District are not responsible for the acts of said contractor. (Section 2671, Title 28, U.S.C.A.).

3. That under Article 16, Section 6 of the Constitution of the State of Louisiana for the year 1921, the Board of Commissioners for the Fifth Louisiana Levee District is permitted by law to disburse its funds in compensation only for lands and improvements thereon actually used or destroyed for levee or levee drainage purposes; that under said Article and Section of said Constitution, said Third-Party Defendant is not permitted to pay for timber used or destroyed as the result of levee enlargement or construction.

4. That under said Article and Section of said Constitution referred to, supra, said Third-Party Defendant is not permitted to pay for batture land used or destroyed for levee purposes; that the land on which said timber was growing and which plaintiff is claiming was destroyed in the enlargement of the Babstrom and Ashland levees, was batture land; that said timber was an immovable by destination, and therefore, a part of said land.

5. That under the terms and provisions of said Article and Section of said Constitution above referred to, supra, it is necessary for plaintiff herein to allege that the timber claimed to have been destroyed was assessed on the tax rolls of Concordia Parish, Louisiana for the year preceding its destruction; that plaintiff's complaint failed to allege the assessment of said timber as required by law.

[fol. 109] 6. Third-Party Defendant avers that it gave due and written notice to the record owners of the land on which the timber was situated that the said Babstrom and Ashland levees would be enlarged and that additional rights of way would be required; that under the laws of the State of Louisiana it is only chargeable with a responsibility to give such notice to said land owners, and in no manner is obligated under said laws to notify owners of timber that same might be destroyed or used in the construction or enlargement of levees.

Second Defense

Third-Party Defendant affirmatively shows that prior to the time the work was actually commenced and begun on the Babstrom and Ashland levee enlargements, plaintiff had knowledge of the fact that said enlargement of said levees was to be commenced, and that as the said work progressed its timber would be damaged in order that this work might be completed; that representatives of plaintiff had an informal agreement with representatives of the H. B. Blanks Construction Company and the Pioneer Contracting Company, Inc. whereby said contractor was to do and perform certain acts in order to conserve and save as much of the merchantable timber as could be saved during the construction of said enlargements.

Third Defense

1

Third-Party Defendant admits the allegations contained in paragraph One.

[fol. 110]

2

In answer to paragraph Two, the matters contained therein are conclusions of laws, and Third-Party Defendant is not called upon either to admit or deny, but if called upon to do so the same are denied.

3

That due to the lack of sufficient information upon which to base a belief, Third-Party Defendant denies that plaintiff was the owner of said timber referred to in paragraph Three, but does admit that said timber was situated in Concordia Parish in the State of Louisiana, and lay outside of the Mississippi River levee commonly known as the Babstrom Levee; that is to say, the timber upon the land referred to in paragraph three lay between the Babstrom Levee on the west side of the Mississippi River, in the State of Louisiana, and the Mississippi River.

4

Third-Party Defendant denies the allegations contained in paragraph Four except as herein admitted, modified or explained.

Further answering said paragraph Four, Third-Party Defenda... shows that the H. B. Blanks Construction Company and the Pioneer Contracting Company, Inc., under contracts with the United States of American, entered upon the lands referred to in paragraph Three, supra, with equipment and machinery necessary for the clearing of the right of way for the Babstrom and Ashland levee enlarge-
[fol. 151] ments, and cleared the growing timber and other vegetation from such land as was necessary to secure earth for the construction of the said Babstrom and Ashland levee enlargements. Third-Party Defendant expressly denies that the said H. B. Blanks Construction Company and/or the Pioneer Contracting Company, Inc. willfully, arbitrarily and wantonly destroyed any timber belonging to the plaintiff and expressly denies that the defendant or the Third-Party Defendant herein are liable to plaintiff for timber to the value of $9,000.00, or in any amount whatsoever.

5

In answer to paragraph Five, Third-Party Defendant denies the allegations contained therein except as herein admitted, modified or explained.

Further answering said paragraph, Third-Party Defendant shows that the rights of way for the Babstrom and Ashland levee enlargements were appropriated by the Third-Party Defendant under the Police Powers granted it by its sovereignty, the State of Louisiana; that thereafterwards the United States of America was authorized by the said Third-Party Defendant to enter thereon and construct said levee enlargements, which construction included the clearing and removing of the timber and other vegetation from the right of way. Third-Party Defendant expressly denies that the appropriation of the right of way by the Board of Commissioners for the Fifth Louisiana Levee District, Third-Party Defendant herein, was contrary to the laws, rules and regulations of the State of Louisiana

and Governmental Agencies with respect to such matters, [fol. 112] and further denies that the appropriation of the right of way was contrary to the Flood Control Acts of the United States.

6

In answer to paragraph Six, the allegations therein contained are denied except as admitted, modified or explained in the preceding paragraph Five herein.

Further answering said paragraph, Third-Party Defendant shows that the plaintiff herein, through its duly recognized and empowered agents and employees, shortly after the commencement of the Babstrom enlargement herein referred to, entered into an informal agreement and understanding with agents and employees of the Pioneer Contracting Company, Inc. and/or the H. B. Blanks Construction Company, whereby the said contracting company or companies were to conduct its clearing operations in such a manner as to save and conserve as much as possible of plaintiff's timber situated in the Babstrom enlargement right of way area; that in accordance with said agreement between plaintiff herein and the said H. B. Blanks Construction Company and the said Pioneer Contracting Company, Inc., the said timber situated on said right of way was cut, cleared and conserved.

7

In answer to paragraph Seven, Third-Party Defendant shows that no answer thereto is required. Third-Party Defendant further shows that a copy of said contract will be produced at the trial of this cause.

[fol. 113]

8

The allegations of Paragraph Eight are denied except as herein admitted, modified or explained.

Further answering said paragraph, Third-Party Defendant shows that the contracts between the H. B. Blanks Construction Company and the Pioneer Contracting Company, Inc., required the respective contractors to clear the right of way of timber and other vegetation.

Further answering said paragraph, Third-Party De-

fendant specifically denies that said contracts required the destruction of said timber and avers that said contracts provided only for the removal of said timber from the right of way.

9

The allegations of Paragraph Nine are denied.

Further answering said paragraph, Third-Party Defendant shows that this plaintiff did remove timber from the right of way as above referred to in paragraph Six.

Further answering said paragraph, Third-Party Defendant avers that it gave due and written notice to the record owners of the land on which the timber was situated that the said Babstrom and Ashland levees would be enlarged and that additional rights of way would be required; that under the laws of the State of Louisiana it is only chargeable with a responsibility to give such notice to said land owners, and in no manner is obligated under said [114] laws to notify owners of timber that same might be destroyed or used in the construction or enlargement of levees.

10

In answer to paragraph Ten, Third-Party Defendant shows that the allegations contained therein are a conclusion of the pleader, but if an answer is required same is denied.

11

In answer to paragraph Eleven, Third-Party Defendant shows that the allegations contained therein are conclusions of the pleader and require no answer.

12

The allegations of paragraph Twelve are denied.

Further answering said paragraph, Third-Party Defendant shows that the borrow pits and levees were located in accordance with sound engineering practice and custom.

Further answering said paragraph, Third-Party Defendant shows that the land in the area on which said timber was growing was batture land.

13

The allegations of paragraph Thirteen are denied except as herein admitted, modified or explained.

[fol. 115] Further answering said paragraph, Third-Party Defendant shows that the construction of the Batstrom and Ashland levees was undertaken and prosecuted in accordance with the Flood Control Act of May 15th, 1928, as amended.

14

The allegations of paragraph Fourteen are admitted.

15

In answer to paragraph Fifteen, Third-Party Defendant denies that it is liable to the plaintiff, the United States of America, or to any other party in the sum of $9,000.00, or in any sum whatsoever, as the result of the alleged destruction of the timber referred to in plaintiff's complaint.

Wherefore, Third-Party Defendant prays that upon the trial herein the demands of the plaintiff and/or defendant and Third-Party Plaintiff against the Board of Commissioners for the Fifth Louisiana Levee District, Third-Party Defendant herein, be rejected and disallowed at plaintiff's costs.

Board of Commissioners for the Fifth Louisiana Levee District. (S.) by Thompson L. Clarke, District Attorney and Legal Advisor.

[fol. 116] *Duly sworn to by Thompson L. Clarke. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 117] IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE ANSWER OF THE THIRD PARTY DEFENDANT —Filed —— 6, 1952

No. 2536

Comes the plaintiff, General Box Company, by its attorneys, and moves the Court to strike the Answer of the Third Party Defendant to the Original Complaint, and for grounds assigns:

1. The Answer is not responsive to the third party complaint.

2. The Complaint states no cause of action against the third party defendant.

3. The third party defendant interjects in its answer denials of matters which the defendant has admitted.

And for other grounds.

Respectfully submitted,

(S.) Fred G. Benton, Baton Rouge, Louisiana.
(S.) Carl A. Chadwick, Natchez, Mississippi.
Barnett, Jones & Montgomery, By (S.) P. Z. Jones, Attorneys for Plaintiff. Jackson, Mississippi.

[fol. 118] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

MOTION FOR SEVERANCE—Filed February 6, 1952

Nos. 2536 and 2804.

Comes the plaintiff and moves the Court to order separate trials as between the plaintiff and the defendant and as between the defendant and third party defendant, as pro-

vided under Rule 42 of the Federal Rules of Civil Procedure.

Respectfully submitted, (S.) Fred G. Benton, Baton Rouge, Louisiana.

(S.) Carl A. Chadwick, Natchez, Mississippi.

Barnett, Jones & Montgomery, By (S.) P. Z. Jones, Attorneys for Plaintiff, Jackson Mississippi.

[File endorsement omitted.]

[fol. 119] IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER CONSOLIDATING CASES—February 6, 1952

No. 2536 and 2804

By stipulation of counsel, it is ordered and adjudged that these two causes be and they are hereby consolidated for trial; and further, that the cause as consolidated be and the same is hereby transferred for trial to Alexandria Division of the Western District of Louisiana.

Ordered and Adjudged on this 6th day of February, 1952.

(S.) Ben C. Dawkins, United States District Judge.

Approved:

(S.) Fred G. Benton, Baton Rouge, Louisiana. (S.) Carl A. Chadwick, Natchez, Mississippi. Barnett, Jones & Montgomery, Jackson, Mississippi, By (S.) P. Z. Jones, Attorneys for Plaintiff. (S.) Wm. J. Fleniken, Acting United States Attorney. (S.) Thompson L. Clarke, District Attorney, and Attorney for Board of Commissioners, Fifth Louisiana Levee District, Third Party Defendant.

[fol. 120] [File endorsement omitted]

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA, ALEXANDRIA DIVISION

No. 2536 Civil Action

GENERAL BOX COMPANY

v.

UNITED STATES OF AMERICA & PIONEER CONTRACTING COMPANY & BOARD OF COMMISSIONERS, 5th Louisiana Levee District, 3rd Party Defendant

No. 2804 Civil Action

GENERAL BOX COMPANY

v.

UNITED STATES OF AMERICA & 5th Louisiana Levee District, 3rd Party, Defendant

Transcript of Proceedings

Proceedings had in the above-entitled action before the Honorable Ben C. Dawkins, U.S. District Judge, at Alexandria, Louisiana, February 6, 1952.

APPEARANCES:

Fred G. Benson, P. Z. Jones & Carl A. Chadwick, Attorneys for Plaintiff.

William J. Fleniken, Acting U.S. Attorney & Sol B. Pressburg, on behalf of the Government.

Thompson L. Clarke, Attorney on behalf of 3rd Party Defendant, 5th La. Levee District.

Sidney Young, U. S. Court Reporter.

[fol. 121] COLLOQUY BETWEEN COURT AND COUNSEL

The Court:

Gentlemen, are you ready with this case for trial today?

Mr. Fleniken:

The Government is ready.

Mr. Clarke:

The 3rd Party Defendant is ready.

Mr. Benton:

The Plaintiff is ready.

The Court:

I see you have just filed some motions.
Do you want to refer those to the merits?

Mr. Jones:

Your Honor, we submit those motions without argument.

The Court:

Let them be overruled. I cannot pass on any motions as vague as those are without something said about it.

If both causes are tried in one case, the evidence will all be in.

Mr. Jones:

I will make this statement about the motions, if I may be permitted: The Motion for Severance has to do with [fol. 122] separating the action between the defendant and the 3rd party defendant separate from the main action of the plaintiff, General Box Company against the United States.

We sue the United States Government under the Tucker Act, or under the tort claim act in the alternative. That is the main action for the destruction of the timber. The 3rd party complaint relates to a guarantor——

The Court:

The Government filed that complaint?

Mr. Jones:

Yes, sir.

The Court:

It is ordinarily entitled to be sued alone, but when it brings in another party, I don't think it lies in the Government's mouth to question it, and you are objecting on the part of the 3rd party.

Mr. Jones:

We are objecting to being interjected into our lawsuit a second controversy between the Government and the Levee Board. We say that is a separate lawsuit which operates to delay us in this main action.

The Court:

I haven't had a chance to dig into it and I will refer it to the merits and when the case is once tried, I don't think we can do it again.

[fol. 123] Mr. Jones:

I will make this statement about striking the answer of the 3rd party defendant: The Government filed a 3rd party complaint against the Levee Board and set up in its complaint certain things the Levee Board had guaranteed to the 3rd party defendant. The 3rd party defendant, instead of answering the 3rd party complaint, comes in and answers the plaintiff's complaint against the Government and interjects itself as a defendant in the main action when we have not made it a party to the main action and we are asking its answer be stricken as it relates to the main action.

The Court:

Here is the legal situation: It is similar to a cause in warranty and the person having the warranty can call a warrantor and make him stand up in his place and in that case the warrantor has all the defenses that can be urged where he has to take the place of his vendee.

I think whatever would tend to defeat your claim would be a defense on the part of him.

So, the motion is denied.

Mr. Jones:

Here is a stipulation which relates to the transfer of the case—

The Court:

As I understand, gentlemen, you have stipulated the correctness of certain documents to be used in the trial.
[fol. 124] Is that what the agreement is?

Mr. Jones:

Yes, Your Honor.
May we introduce these documents at this time?

The Court:

All right.

Mr. Jones:

"Plaintiff's Exhibit 1" is a copy of a deed from R. B. Sharp to General Box Company dated April 9th, 1947 for the timber on what is known as the Excelsior & Home Place plantations in Concordia Parish, the deed being recorded in Book E-3, page 347 of the Conveyance Records in Concordia Parish.

"Plaintiff's Exhibit 2" is a blueprint made by Jerome H. Summers for the General Box Company on December 18th, 1946 of the R. B. Sharp tract of land.

"Plaintiff's Exhibit 3," is a copy of a deed from John R. Bridwell and wife, Lora A. Bridwell, known as Roseland Plantation, the deed being to the General Box Company and the land being in Concordia Parish and dated September 21st, 1946 and being recorded in Book , page , Concordia Parish.

[fol. 125] "Plaintiff's Exhibit 4" is a deed from the General Box Company to Orrin Jaines for the land, reserving the timber on the plantation known as Roseland in Concordia Parish, Louisiana, the deed being dated November 15th, 1946 and recorded in Book D-3, Page 329.

The Court:

There is one vital question in this case and that is the liability of the government for the destruction of this timber.

Has the answer denied the ownership and acquisition of the property in the manner outlined in the complaint?

Mr. Jones:

No, sir, it has not.

The Court:

Why clutter up the record with the deeds?

Mr. Benton:

If Your Honor please, the question of damages is of such a nature that we have to have the deeds to show the type of ownership involved.

The Court:

Why can't you stipulate that?

Mr. Benton:

It would probably take less time to make these offerings. You have one situation where the ownership of the timber extended for a period of twenty years and you have another situation where it was more limited and extended over a period of ten years.

[fol. 126] The Court:

That is one reason why we should have had a pre-trial conference and eliminated that, but you didn't do it, so go ahead.

Mr. Jones:

"Plaintiff's Exhibit 5" is an aerial map of the property of the General Box Company in Concordia Parish made in November 1945, upon which is super-imposed certain markings which indicate the outside limits of the borrow pit, or pits, the said markings being in yellow, made by the contractors under the contracts involved in this suit, and markings in red on the map showing the timber line nearest the levee after the performance of the contracts by the government contractors. Between the blue line shown on the map and the red line shown on the map is the area from which the timber involved in this suit was damaged and destroyed.

"Plaintiff's Exhibit 6" is a contract of the United States Engineers to and with the H. B. Blanks Construction Company, this contract being for the construction of Item M-343, R, A, B, & C, Brabston Levee Concordia Parish, Louisiana.

The Court:

I take it that is a very voluminous document that has a few clauses that have any bearing on this case.

Mr. Jones:

Your Honor, I think we can designate the Items which involve this timber.

The Court:

All right.

[fol. 127] Mr. Jones:

"Plaintiff's Exhibit 7" is a contract of the United States Engineers to and with the Pioneer Contracting Company for the construction of Item M-343-R, D & E, Brabston Levee.

The Court:

I believe I dismissed that from the suit, or you dismissed it?

Mr. Jones:

Yes, sir, we dismissed it as to the Pioneer.

(Whereupon the above described documents were marked "P 1" through "P 7" and filed in evidence with the Clerk.)

The Court:

Is there any dispute among you gentlemen as to the quantity of timber that was destroyed?

Mr. Fleniken:

There is, yes, sir.

The Court:

All right.

[fol. 128] SANFORD F. MULLINS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Benton:

Q. State your name, sir?

A. Sanford F. Mullins.

Q. Where do you live and what is your business, Mr. Mullins?

A. I live at 410 Walnut Street, Natchez, Mississippi. I am engaged in the veneer and lumber business.

Q. What business is that?

A. General Veneer Company.

Q. What was your business connection in 1947 and 1948?

A. I was logging superintendent for the General Box Company at the Natchez, Mississippi plant.

Q. That is the plaintiff company involved in this suit?

A. Yes, sir.

Q. In what capacity did you say you were employed by that company?

A. Logging Superintendent.

Q. How long did you serve that company in that capacity?

A. I served them for five years.

Q. Mr. Mullins, when did your connection with that company cease?

A. In March of 1949 and I was off for a period of two months and went back in their employ to help settle up some matters I had hanging in Natchez and I left them then in December of 1949.

Q. Have you any interest in that company at the present time?

A. No, sir.

[fol. 129] Q. Have you any interest in that company at the pres- of any kind?

A. No, sir.

Q. In order to simplify as much as possible the question of damages involved in this suit, just state and give designations to the two properties that were here involved from which certain timbers were destroyed by these two contractors?

What was the designations that you carried for these two properties?

A. Well, on R. B. Sharp, that was known as the Excelsior and Home Place. That was the southern properties in this case.

Q. The southern properties?

A. Yes, sir, downstream.

Q. And what was the designation of the other place?

A. It was known as the—we call it Fairview, but it is known as the Roseland Plantation we bought from Mr. J. H. Birdwell, in fee.

Q. I suggest hereafter you refer to the two places as Excelsior and Roseland?

A. Yes, sir.

Q. What two contractors were involved in this major construction program there?

A. H. B. Blanks Construction Company and Pioneer Construction Company.

Q. Where was the Pioneer working in reference to these two parties?

A. Pioneer worked on the north end of Roseland Plantation. The H. B. Blanks Construction Company, at the time I found out they were working, were working about midway of the Excelsior property which was four miles along the levee.

Q. Certain titles have been offered here showing the interest and ownership of the General Box Company in the timber located on these two properties.

[fol. 130] For the sake of clarity, state what that interest was as to the timber located on Roseland?

A. The General Box Company succeeded the Natchez Veneer and Lumber Company at their Natchez plant in April 1943. At that time the Natchez Veneer and Lumber Company sold to the General Box Company their interest in the timber on Roseland which was an agreement that they were to cut the timber and pay Mr. J. H. Bridwell for the timber, and later went back and bought the land from Mr. Bridwell outright. At the time we bought the land from Mr. Bridwell we had about two months to go on this contract which the General Box Company owned the timber. It was my opinion that we could buy the land and the

timber and perpetuate our run in Natchez and I suggested to the General Box Company we buy the land and fee and we did consummate this deal—I believe it was in September 1946. We bought the land and the timber and half the mineral rights from Mr. J. H. Baidwell.

Q. At the time that this destruction took place, what interest did you have in the timber on the Roseland Plantation?

A. We sold the land to Mr. Orrin James and made an unconditional reservation on all timber and timber-like trees for a period of twenty years and I believe that deal was made where we sold the land to Mr. James in November of 1946.

Q. At the time this alleged trespass and destruction of timber occurred on the Excelsior Plantation, what interest did you have in the timber thereon?

A. We owned all timber measuring eighteen inches and up, sixteen inches from the ground at the time of cutting for a period of ten years from April 17th, 1947.

The Court:

Do you mean eighteen inches at the stump?

[fol. 131] The Witness:

Yes, sir.

The Court:

That is pretty big timber, isn't it?

The Witness:

No, sir, it is not big timber in cotton wood and willow.

The Court:

I am used to pine.

The Witness:

We had other timbers, gum and hackberry and other hardwoods measuring sixteen inches from the ground. However, sweet pecan was excluded.

By Mr. Benton:

Q. What was the primary reason General Box Company acquired this timber? For what purpose did they acquire it?

A. On these two particular tracts, neither of them were tracts we needed immediately, but we used in the Natchez mill about fifteen to sixteen million feet of timber per year and it was the General Box Company's idea to operate that plant as long as they could and it was my idea, as the timber buyer and logging superintendent, to buy growing timber in order to perpetuate our operations.

We paid the premium for this particular tract of timber with the idea of letting it set there until such time as we needed the timber and the same thing hold true on the Roseland Plantation because we bought it in fee and reserved the timber rights for twenty years.

Q. The latter reservation applying to all the timber?

A. Yes, sir, all timber.

[fol. 132] Mr. Fleniken:

If Your Honor please, we object to the testimony on the future value of the timber because the complaint does not allege any future value, only for the timber destroyed.

The Court:

I don't think that is what he is attempting. He is attempting to show the timber less than eighteen inches at the stump did have some value because of its possibilities and not that it was merchantable timber.

Mr. Benton:

As I understand it, if Your Honor pleases, we are entitled to recover the damages which was suffered by virtue of the destruction of the timber. In the case of Excelsior, there was, of course, available certain timber eighteen inches in diameter, sixteen inches above the ground, but our privilege in ownership extended over a period of ten years, so that any timber that would attain that growth within the period of time was timber in which we had an interest and I think the Court would take into account the value of that timber too.

The Court:

The value at the time it was destroyed?

Mr. Benton:

That is right; that it had value at that time.

Say, it was fourteen inches and within the ten year period it would be eighteen inches, there would be a present value at the time it was destroyed which, of course, would not be equivalent to the value of a full grown merchantable tree but it had a value.

The Court:

Objection overruled.

[fol. 133] By Mr. Benton:

Q. The ten year privilege applied only to trees that would attain the growth of eighteen inches, sixteen inches above the ground within the ten year period?

A. That is correct.

Q. Had the General Box Company cut and removed any of that timber at the time of this destruction?

A. No, sir.

The Court:

What tract is it you are talking about?

Mr. Benton:

I am talking now about both tracts, the Roseland and Excelsior.

The Witness:

They had not cut anything on the Excelsior tract at all.

On the Roseland plantation there was an operation just prior to this destruction in 1946—there was an operation on this particular piece, yes, sir, that was discontinued in the late fall of 1946, however.

By Mr. Benton:

Q. Did the operation on the Roseland Plantation, which you mentioned, involve the area about which we are con-

cerned in this suit where the timber was destroyed by the contractor?

A. There was an operation out there, but immediately upon acquiring this land in fee I stopped that operation because of the fact that we were trying to grow timber and we ceased operations out there altogether.

Q. You started the operations where you owned the timber only?

A. When we owned the timber only, yes, sir.

[fol. 134] Q. In your capacity of logging superintendent, if any notice of any kind had been received by the General Box Company about the proposed destruction of this timber either on the Roseland plantation or the Excelsior and Home Place tract, would that notice have come to you?

A. It would have come to my attention, yes, sir.

Q. What if any notice did you ever receive?

A. None.

Q. As to this destruction?

A. None whatever.

Q. Just where were these properties located—I mean from a standpoint of accessibility? How accessible were these properties from Natchez?

A. Well, they were very easily accessible. You cross the river and go down the highway. The road was on top of the levee.

Q. How many miles south of Natchez?

A. Approximately twenty-three miles to the upper place, or the Roseland Plantation and about twenty-five miles to Mr. Sharp's place, I suppose.

Q. When and how did you find out that this destruction was going on down there, on either one of these destructions? Where was the destruction occurring when you first found out about it?

A. The dozers had practically cleared the north end of Roseland when I heard about this thing.

Mr. R. B. Sharp, who we bought the timber from, came to me one day in Natchez and said, "Moon, they are tearing up your timber down there. You better get down and see what the trouble is. You are not going to have any timber left."

That is the first I knew about it.

Q. Did you go down there?

A. Yes, sir.

[fol. 135] Q. What cutting had occurred—what destruction had occurred?

A. The H. B. Blanks Construction Company had their bull-dozers in there and were approximately halfway down the levee on the Excelsior and Home Place tract and that was the extent of the destruction when I got there.

Q. What did you do, if anything?

A. I sent by logging crew down there the next day with five cross-cut saws, two tractors, two trucks and a loader and told them to start cutting the timber and removing it and my crew got down there and Mr. F. Farmer of the H. B. Blanks Construction Company said they couldn't do that; that he didn't look at it with the trees laying down; he looked at it with them standing up.

I got my report from my logging foreman and I went down and met Mr. Farmer on the levee. Mr. Farmer says: "Moon, looks like we got a race here."

I says, "It sure does. What are we going to do about it?"

He says, "Well, I am going to push the trees down because my contract, when I bid on this, the trees were standing and if I permit you to cut them I am going to have to blast them and that will cost me—" if I am not mistaken he said one hundred or two hundred or maybe four hundred dollars an acre additional money and he didn't bid on it that way.

I said, "Well, Don, that is our timber out there. My gosh, we got some rights."

He said, "Well, we are going to have a race now, Moon. I can put enough bull-dozers in there to push the timber down before you can get down here tomorrow but I am willing to cooperate with you. I will not let you cut the trees down but I will push them down and after they are down, if you will agree to stay one hundred yards ahead [fol. 136] of my machine, I will leave the larger trees for your men to cut out."

We then go back to Natchez and go to see Mr. Chadwick and we go over to the United States Engineers' office and talk to Mr. Joe Wright who—I don't know his title. I understand he was in charge of this construction.

I said, "Joe, what are we going to do down here? You destroyed our timber."

He said, "I don't give a damn what you do. You just leave my contractor alone."

I said, "We got certain rights down there. We bought and paid for the timber and we are paying taxes on it."

He said, "I don't care what you do. Just leave my contractor alone."

So, we go back and Mr. Farmer was very cooperative and the balance of that operation down there—he did push the trees over and left them lay there and the roots were all on them and we cut what we could out of them.

Q. What did you actually salvage out of the timber he pushed over in that style?

A. From the time we got down there and started cutting the timber we hauled to the river bank three hundred and thirty thousand feet of logs.

Q. You are speaking about timber that was being cut on the Excelsior tract; is that correct?

A. Yes, sir.

Q. Have you made an estimate of what timber had already been destroyed before you began this salvaging operation on the Excelsior tract?

A. I have arrived at a figure that, I believe, would be correct because the timber on the lower end was no better than the timber on the north end and we did salvage three hundred and thirty thousand feet of logs as they were from the time they started to the end of the property.

[fol. 137] It is my assumption, having looked at the timber for several years, and very closely before purchasing the timber, that there would be three hundred and thirty thousand feet on the north end of the Excelsior property.

Q. Was that completely destroyed?

A. Yes, sir.

Q. When you speak about three hundred and thirty thousand feet, are you talking about the timber on the Excelsior tract that was eighteen inches in diameter, sixteen inches above the ground?

A. Yes, sir, talking about timber we hauled off the Excelsior under our rights.

Q. Have you made any estimate of the timber that was destroyed say, on the north part of the Excelsior Plan-

tation before your salvaging operations began which was under eighteen inches at that time but which would have attained the growth of eighteen inches during the ten years of your contract?

A. Of course, that is the essence of this whole deal—the reason we bought it. Common forestry will state that cotton wood along the Mississippi River will grow a minimum of six tenths of an inch per year. I think that is the bare minimum. Therefore, all trees on that property, it is reasonable to assume, would have grown six inches in our ten year contract. Therefore, all trees measuring ten inches across the stamp at the time of the destruction would have become our property within the ten year contract and that was the value of this piece of property largely; was the fact that we had bought it for ten years with the idea of growing this timber. The value of the timber up there—certainly, I couldn't tell you exactly how much was standing on this piece of property north of where I started my salvage operation but, as I said before, it is reasonable to assume that from the points that we started salvage operations and went southward, we [fol. 138] were halfway through it. The timber was just as good on the northern part of this property—it would have been three hundred and thirty thousand feet because we actually cut from the lower tract, three hundred and thirty thousand feet.

Q. Mr. Mullins, I am trying to get some idea of the number of potential timber feet that were involved in the northern area of the Excelsior tract?

A. Approximately five hundred thousand feet. By that I am splitting your timber in half because I feel we did salvage or cover half of the ground involved in this destruction in our salvege operation.

Had this timber been permitted to stand, we would have cut approximately nine hundred thousand to a million feet from this particular area.

Q. What particular area—the part north of your salvage operation?

A. From the entire strip.

Q. From the entire strip?

A. Yes, sir.

Q. What did you accomplish by this salvage operation? Did you save all of that timber?

A. No, sir.

Q. What, if anything, did you save?

A. We were put to a great deal of expense in cutting the trees. That was the first matter of damage. When the tree is pushed over with your roots and all hanging on it——

Mr. Fleniken:

If Your Honor please, I think this is beyond the pleadings. I am going to object to this testimony.

The Court:

To what extent do you claim it is beyond the pleadings?

[fol. 139] Mr. Fleniken:

If Your Honor please, he hasn't claimed any damages in the processing of these trees for lumber and that, as I understand it, is what he is testifying to at this time.

Mr. Benton:

That is an element of damages. We claim so much damage in our petition. We didn't attempt to detail in our petition all the elements in arriving at the figure. We are not supposed to detail all that stuff.

The Court:

If the defendants are liable for this timber, they will be liable for it on the basis of a fair market value of the timber as standing timber and I am impressed at this time—I don't know what I will decide when I come to the question of law—that they also had a value in the timber below the sizes that were stipulated in the contract.

We know it is a principle of law that one who sees his property being damaged carries an obligation to minimize the damage as much as possible in trying to save what can be saved from the destruction and I get the impression, so far, from this witness' testimony that that is what they were trying to do, was to salvage the timber in the condition it was pushed down by the bull-dozers and the amount of damage would be based upon the stand-

ing timber that was destroyed. As against that, they would have to give credit for what they realized net out of the timber and hence the expense of cutting the timber, I think, would be property deducted from the total proceeds of the timber in determining the credit to go upon the value of the timber as it stood, so the objection is overruled.

[fol. 140] Mr. Benton:

Will you read my question?

(Whereupon the last question was read by the reporter.)

The Witness:

I was about to say there that this tree then would be suspended up in the air maybe four to six feet and we had to cut that tree and leave what normally would be the stump that was lying down—we couldn't get close enough over here to cut it (indicating). We had to leave some times as high as five to six feet on the stump. That is a great part of our tree. We normally cut a stump from twelve to eighteen inches.

I explained to Mr. Farmer when we discussed this bull-dozing that in a tree dozer, you walk up to a tree with this powerful machine and put this fork up there probably twelve to fourteen feet and the tractor will lunge into the tree which gives the tree a whipping action and the next time the tree goes with him, he walks it down. In doing that you have destroyed the fiber of the trees and, therefore, that prevented us from using any of the timber in the veneer mill. We did use it in the sawmill and put it in the stack to dry and we found we lost at least thirty percent of the lumber because when we put it through the machine to manufacture it, I will say we lost thirty percent of the value of the lumber. We cut it in pieces as long as this (indicating)—it would all fall to pieces when we tried to manufacture it for veneering purposes.

The Court:

About twenty-four inches?

The Witness:

We cut it, Your Honor, from nine inches up because it was going into box cleats and, therefore, it was all we

[fol. 141] could use it for. We couldn't use it for veneer because we used a rotary lathe and you couldn't cut timber that was damaged by these bull-dozers because you have the same effect as a terrific windstorm in pulling the fibers off of the tree.

In my calculations on that, we could have used at least ninety percent of the timber in the veneer mill had we been permitted to cut it from the stump. We set a price on our veneer logs and a price on our sawmill logs. At that time we only manufactured box grade lumber for our own use and we were normally paying $35 a thousand for sawmill logs.

We put this lumber through the mill, the logs—we set a value of $18 for a thousand feet, that is, the tree as it stood on the property. It cost me $16 to log it. We put it on the riverbank. It cost us an average over the year—I couldn't testify to these particular three barges of logs, but over the year it would cost us $6 a thousand to load them on the barges and push them to the mill and unload them and it cost about $13 to process. In other words, when we put this through the mill, of that $53 lumber, we lost one-third of it.

Q. You lost one-third of $53 on every thousand feet?
A. Yes, sir.

The Court:

Mr. Benton, it is not my conception he is entitled to recover the loss in the market value of his lumber. Your timber, as I said a while ago and we have got to keep that idea in mind, was worth so much standing and that would be if he is entitled to recover what he should recover, the fair market value of that standing timber. If he didn't come out of that operation in saving some of that timber with a profit, then there is no credit to go upon it. He took that chance and the government wouldn't be re- [fol. 142] sponsible for his operations on it, but if he did make a profit out of it, I think after taking into consideration the labor, and so forth, if he had a net profit on it and, of course, allowing a reasonable profit for the handling of the lumber, and things like that, why, that would be what would be credited against the value of the standing timber.

Mr. Benton:

Your Honor, that is exactly what we are doing. If you take these figures and run them against three hundred and thirty thousand feet of standing timber which he salvaged—if you run it out on the basis of his calculations which were the sums involved in the salvaging process, the General Box Company saved considerable money as against the total loss which would have been involved for the standing trees.

In order to show what the actual loss was, Your Honor's position is exactly the position that I take, but Your Honor pointed out, and correctly as I see it, it was incumbent on the General Box Company to take reasonable steps to salvage whatever they could. They undertook to salvage and did salvage three hundred and thirty some odd thousand feet of timber. Therefore, in arriving at actually what they saved by that process, it becomes necessary to show the facts Mr. Mullins brought out.

Now, they had to transport the trees and cut them and process them and he is trying to establish for the benefit of the Court actually what the loss was in the salvaging process. It will be tied into these things, to make these savings, and among other things the witness pointed out after they processed the timber, which costs $13 after they transported the timber, it cost $16 plus six after making the allowances of the stumpage value of the timber, which would be the value, Your Honor, which would be germane for us to recover. After taking into account all those ele-
[fol. 143] ments, they lost one-third of that timber. So, you take one-third of the $53 which is what the loss would be. You would have to take the over-all picture of the value of the timber after it was finished. They couldn't use any for veneering. They did produce it for timber which was salable and in doing that they lost one-third and they lost the stumpage value, plus transportation value, the processing value and that amount would have to be deducted from the total amount which they otherwise saved by the salvaging process.

I think Your Honor will agree that we are attempting to arrive at the standing value of the timber at the time this destruction occurred.

The Court:

That is ascertainable in other ways, Mr. Benton, and that is by estimators. These mills deal with standing timber and pay millions of dollars for timber based on estimates made by estimators.

Mr. Benton:

We could make the other approach and I will make it. I think the process of mathematics Mr. Mullins used is relevant.

The Court:

Here is the great difficulty with what you are attempting to do now: You run into a whole lot of angles that are difficult to handle.

A long time ago I represented a big sawmill company and we had to deal with a lot of that stuff and I do know in dealing with large sawmill companies they had confidence enough in their estimators to go out there and tell you how much timber was on thousands of acres of land and pay for it on that basis. That was the general recognized method of evaluating standing timber.

[fol. 144] In this proposition you have here, suppose they lost money in this attempt to save the timber—they came out with a net loss—is it your contention they could make the government pay for that loss?

Mr. Benton:

If Your Honor please, if they undertook a salvaging operation in good faith, they are really trying to minimize their damages. As a matter of fact, they would be debarred from seeking to recover if they didn't try to minimize their damages. If they lost on it in good faith, I think the government would be liable for the standing timber.

In this case you will find out it was not a loss. It was a gain.

The Court:

That gets into the field of how much credit the government is going to receive on the profit.

Mr. Benton:

But you have to take into that the essential factors that were involved in the salvaging process. In order to determine what the net gain was from the salvaging process, you have got to take off the cost of the essential steps and the witness testified after they finished it, they found they couldn't adapt this timber for veneering purposes and used it for lumber purposes and after they finished—they lost one-third of that timber. Just exactly how that is going to figure here finally, I will admit it is rather a difficult problem. I would like to go back and ask the witness this question:

By Mr. Benton:

Q. Did you salvage any of that timber under eighteen inches in the salvaging process?

[fol. 145] A. I couldn't swear to the fact that we did not salvage any timber under eighteen inches. I imagine that we did. I say that when these trees are pushed over, a lot of times they had dirt on the trees maybe for fifteen feet up the tree. We couldn't see the stump. We cut what we could find. It is not practical to take any logs less than twelve inches at the blossom end and a log cut from a cotton wood tree, with two logs in the tree, which would make that tree thirty to thirty-two feet of merchantable timber in there, it would certainly be eighteen inches at the stump.

Q. You were salvaging all the merchantable timber?

A. Yes, sir.

Q. The question of future growth was ended?

A. Yes, sir.

Q. What is that figure you had?

A. We cut three hundred and thirty thousand and, I believe, three hundred and a few feet off there.

Q. That three hundred and thirty thousand included all the merchantable timber?

A. That was the Doyle scale we applied to the logs in considering the extent of the damage. All the damage we could see—maybe the trees would be split. We applied the Doyle scale to them and we scaled three hundred and thirty thousand feet.

Q. What was the value of the timber you salvaged as standing timber to the General Box Company there on that property before it was destroyed? What was the actual market value of that timber for veneering purposes?

A. What we cut there was valued at $18 which was the going price on cotton wood stumpage at that time and we made no distinction between veneering stumpage and sawmill stumpage because that was worked out. If you take your first long and second log, you put that in the veneer mill and you got your sawmill log that came from [fol. 146] the rougher trees. There was no distinction between the two, as far as price was concerned.

The Court:

You brought some of the timber, as I understand it, and some of the timber you reserved when you sold the land?

The Witness:

Not on this tract we are speaking about now. We didn't salvage any timber on the other tract.

The Court:

Is this the tract you bought the timber only, or bought the land and reserved it?

The Witness:

We bought the timber only for a period of ten years.

The Court:

Didn't you have any estimate on the timber when you bought it?

The Witness:

Yes, sir.

Mr. Benton:

If Your Honor pleases, the estimate covered the whole area and this cutting operation was only over a limited area.

The Court:

They base that on so much per acre, Mr. Benton.

Mr. Benton:

I was to prove by this witness, based on his actual inspection of the property—I am going to ask him to esti-
[fol. 147] mate the value of the timber cut because he inspected it himself.

The Court:

I seriously question, although the duty is upon you to try to save and prevent a loss, your right to figure the expenses you go to.

I seriously doubt you could charge the government for the loss because there would be no end and the question of efficient operation, and everything else, would come into it and still you start off with the right to salvage only the stumpage.

These companies putting out money are not going to take any real chance.

Mr. Benton:

That was the question I had gone into with the witness.

The Court:

Did you buy it eighteen inches, or did you buy it under eighteen inches?

The Witness:

We bought it under eighteen inches.

The Court:

You undoubtedly had an estimate on how much was eighteen inches and how much was merchantable at the time.

Mr. Benton:

I have just proved by the witness they went out and actually salvaged all the merchantable timber about twelve inches and it ammounted to three hundred and thirty thousand feet.

[fol. 148] I have asked him the further question: What was the stumpage value of that merchantable timber to the General Box Company at the time this destruction occurred?

What was that value?

Mr. Fleniken:

If Your Honor please, I object again to this line of questioning and submit that the value would be the market value of this timber as it lay on the ground there, not what it would cost to process it and to haul it to Natchez, or anywhere else. First, it would be the value standing.

The Court:

That is the only value, in my judgment.

When you get into this question of manufacturing timber, especially in this confused situation, you don't know what is going to happen.

A company that bought that timber, I don't believe they would buy it unless they had a reliable estimate on it, and it is for you to prove the amount of timber on it when you bought it.

Mr. Benton:

Your Honor will agree this proof I am trying to get from the witness is relevant?

The Court:

Yes, that is corroborating proof.

The Witness:

In answer to your question it would be $18 per thousand board feet.

The Court:

That is for the eighteen inch stuff?

[fol. 149] The Witness:

That is market value. He asked me for market value. At that time, in that area, $18 was the market value.

The Court:

From twelve inches up?

The Witness:

Yes, sir.

Mr. Benton:

Q. That is what you attempted to salvage?

A. Yes, sir.

Q. You have testified in some detail as to the items of special expenses you incurred in salvaging that timber and you mention the fact that after you completed the manufacturing process there was a total loss due to defects that resulted from the felling of one-third.

Can you state to the Court actually what the General Box Company saved as a net amount from that $18 figure? What percentage of that $18 was salvaged?

A. I can give it to you this way: As I said before, we computed the board feet by Doyle measure. We put three hundred and thirty thousand feet on this deck of logs we cut and removed from the area of destruction and when we got it to the mill—after it was manufactured—we lost a third of that due to the defects we could not see in the logs. Actually, I can say the General Box Company salvaged two hundred and twenty thousand feet of merchantable logs from this area.

Q. Did you go over and make a survey and estimate of the area on the Excelsior tract north of the point where your salvaging operations began and that which was detroyed by the contractor?

[fol. 150] A. About all I could do was walk back up the right-of-way because all the trees was laying on the back of it.

Q. They had been moved off the property altogether?

A. Yes, sir.

Q. Was any salvaging process possible at all to those trees?

A. It was possible but not practical. They were rolled up, and everything—he had pushed the smaller stuff out.

Q. Did you salvage anything from that area whatever?

A. No, sir.

Q. Will you state to the Court again what you estimate was the number or merchantable trees that were destroyed on that area, as to the number of feet involved?

A. I would say there was five hundred thousand—I would like to further clarify that by this statement: Since we did cut and remove the three hundred and thirty thou-

sand feet from the area which we did cut, which was approximately half of the property, that there would have been three hundred and thirty thousand feet on the northern part of Excelsior and Home Place. I add to that one hundred and seventy thousand feet of timber that was not of a merchantable size at that time under our contract.

Q. Wouldn't you also add approximately the number of non-merchantable timber on the part where you salvaged?

A. Yes, sir.

Q. So then you had some three hundred and forty thousand feet of non-merchantable timber on that tract; one hundred and seventy thousand feet on the southern end and one hundred and seventy thousand feet on the northern end?

A. Yes, sir.

Q. You have stated what you considered the market value of that timber that was merchantable at that time, twelve inches and up.

[fol. 151] Can you state for the benefit of the record what was the market value of the non-merchantable timber at that time to the General Box Company, taking into account one ten year period in which your rights were to continue to exist there?

A. The value would have been the same as the standing timber for the simple reason that all trees measuring ten inches across the stump would have become the property of the General Box Company within the ten year period.

The Court:

We will take a recess until 1:30.

(Whereupon a recess was taken in the trial of the case to 1:30 p. m., of the same day.)

Afternoon Session.

By Mr. Benton:

Q. Mr. Mullins, I didn't ask you as to just what qualifications are based on your experience and on the duties that you performed as logging superintendent to make an estimation of timber—standing timber—as to the quantity and value thereof?

A. I will state my qualifications as best I know how. I bought timber for the International Paper Company in 1932. I went to work for Anderson-Culley Company at Vicksburg in 1934. I left their employ in 1944 and went to work for the General Box Company and stayed with them until late 1949 and today I am in the sawmill and veneer business and do my own timber buying.

Q. During that time you have been making estimates on timber and buying timber?

A. Yes, sir.

[fol. 152] Q. There has been offered in evidence here—I suppose you would call it an aerial photograph of the area where this cutting took place showing both the Roseland Plantation and the Excelsior tract and there is delineated on this map an inside and outside blue line and then there is an inside blue line which I understand indicates the exact area of the old borrow pit.

The map in question delineates a blue line which marks the foot of the old levee and it delineates an inside blue line which marks the limit of old borrow pit.

The first blue line which I mention is the one nearest to the river. The second blue line is the one nearest to the river which, as I understand it, marks the area of the old borrow pit and closer to the river is a red line and, as I understand it, the timber in dispute here lies between the second blue line, the one nearest the river, and the red line.

I ask you to examine this map, Mr. Mullins, and to state if it does, as you see it, substantially correctly reflect, as you remember it, the area in which this destruction actually occurred both on the Excelsior tract and the Roseland Plantation?

A. You mean this is the area (indicating)?

Q. The area between the second blue line and the one nearest the river, and the red line?

A. Yes, sir, that is approximately correct.

Q. That is approximately correct both as to the Excelsior tract and the Roseland Plantation; is that right?

A. There is one question I would like to ask. Is that scale one in ten thousand?

Q. In connection with the scale which is shown on the map, it is stipulated and agreed that the one in ten thou-

sand shown thereon means that one inch would be equivalent to eight hundred and thirty-three and one-third feet.

Do you stipulate as to that?

[fol. 153] Mr. Fleniken:

Yes, sir.

The Witness:

That is approximately correct.

By Mr. Benton:

Q. In giving the Court the estimate you have as to the value of this timber actually shown, what basis have you used to attempt to arrive at that value from a standpoint of the area involved?

A. On the Excelsior tract which we have been discussing this morning, it was my duty to inspect this timber before we bought it. I looked at the timber as to quality, as to density on the ground and growth, and I then had the timber estimated. The basis on which I am basing my estimate of damage is that we actually—this is not an estimate. This is actual—we cut from the ground three hundred and thirty thousand feet of logs. We took that from approximately half of this area. It is reasonable for me to assume, knowing the land as I did, that there was three hundred and thirty thousand feet that we could have cut had we been permitted to cut it from the point where I started and went southward, there would have been that much from that point northward on the Excelsior tract.

Q. What you are speaking about is merchantable timber?

A. Merchantable timber we could have taken off at that time. The other timber, I estimate would have been approximately one hundred and seventy thousand feet on each end by going over the estimate that was furnished to us and the number of trees and the diameter of the trees. That is the way we have to figure timber estimates. We had the cruiser to furnish us with a cruise on all the trees [fol. 154] measuring six inches and up in diameter at breast height. We apply the growth to that. That is the way we arrive at a price as to whether or not a piece of timber

is worth the price the man is asking for it. That is the way I arrived at my figure that this damage was in excess of nine hundred thousand board feet.

Q. On the Excelsior tract?

A. Yes, sir.

Q. Did you have an opportunity to examine and cruise and survey the timber on the Roseland Plantation?

A. Yes, sir.

Q. Was that before this cutting took place?

A. Before the cutting, yes, sir.

Q. In what way had you been over that timber? What did you known about that timber?

A. I had a logging operation in there at the time we bought this land in fee. I had some teams in there cutting the large cotton wood out and putting it on the river bank. After we decided to buy the land in fee, I stopped this operation because I felt this timber was of such quality and density that it would be to our advantage to quit cutting and let the timber grow. I examined it very closely and, in my opinion, had we been permitted to cut that timber, that we could have cut at least $35 an acre in pulpwood off of there. Assuming that the timber—we didn't have any saw logs. We could have cut saw logs because we stopped the operation of that. They cut approximately a hundred acres—completely cleaned it off—and there was a fine a growth of cotton wood as I have ever seen along the Mississippi River and, certainly, it was worth $35 an acre. Our potential loss had been—had that timber been permitted to stand five years we would have cut $9,000 worth of timber laying outside of the Roseland Plantation Levee. The area they did not destroy is the only area out there with inferior timber. What I mean is that it is Hackberry [fol. 155] and sycamore and stuff that is not of merchantable value in the small stages.

Q. You have offered the suggestion here that this cotton wood was of a market value as stumpage, or standing trees, of $18 a thousand.

What experience did you have during that period of time that justifies you in making that statement?

A. As I told you before, we used approximately fifteen million feet of timber per year and we were paying from

$17 to $22 a thousand for the stumpage. We bought, in this program of buying and timber right in that period some twelve million feet from a man that we paid on the basis of $18 a thousand. We bought timber from other land owners in Mississippi and Louisiana and paid them on the basis of $18 a thousand.

Q. How did this timber on these two plantations from the standpoint of accessibility and quality and maturity and potential compare with other timbers that you bought for your mill?

A. Well, you couldn't compare it generally, but these two tracts of timber were way above the average tracts of timber. In accessibility, we considered accessibility where the Mississippi River ran because we had our boats and barges; and accessibility in seeing after the timber, the highway went through all of it and we bought timber that was standing on islands and we paid $18 for that because so far as accessibility is concerned as long as the river went by, it was accessible to us.

Q. Actually, you estimate there was some one hundred acres of land on the Roseland Plantation upon which you say all of the timber was completely destroyed?

A. Yes, sir.

Q. Do I understand the title you held on the Roseland Plantation, which was a reserve title, was a reservation of [fol. 156] all the timber over a twenty year period?

A. All timber and timber-like trees of every size, kind and description. We reserved the timber rights in that manner and instructed Mr. Orrin James, to whom we sold the land—Mr. James was restricted from clearing any lands whatsoever.

Q. Did you ever have an opportunity by receiving a notice directly or indirectly which afforded you a chance to salvage any of the timber on the Roseland Plantation?

A. No, sir, I did not.

Q. Then that timber must have been destroyed before you found out what was going on on the Excelsior tract; is that correct?

A. The borrow pits were clean when I saw the property.

Q. And when you gave the price of $5,000, do you mean you could have salvaged that in pulpwood at that time?

A. Yes, sir, we could have cut the $3,000 off of it right there.

Q. If you had been offered the opportunity of selling all the timber on the one hundred acre area which you say was clear, what would your company have been willing to sell it for?

A. I don't believe they would have been willing to have sold it at all. However, I do think we could have gotten $5,000 for it.

Q. At that time?

A. At that time.

Q. That is the pulpwood value you are speaking about?

A. Pulpwood and saw logs, yes, sir.

[fol. 157] Q. And that is not taking into account the potential which you have otherwise mentioned; is that right?

A. That is right.

Q. You were generally familiar with all of the timber located on the other plantation, the Excelsior tract, were you not?

A. Yes, sir.

Q. And what have you got to say, if anything, as to the relative density and maturity of the timber on the Excelsior tract in the area where this destruction occurred as compared with the timber spread over the whole area?

A. I will put it this way: In a type map which a competent cruiser will furnish the prospective buyer, the areas are designated as to scattered hardwoods, dense cotton wood, good cotton wood, and on the Excelsior tract I recall this was an approximate figure, but there is some fourteen hundred acres of cotton wood out of the thirty-four hundred acres—three thousand four hundred and fifteen more or less that we had purchased. Out of that there was some fourteen hundred acres of cotton wood and the area that was destroyed was just as dense in cotton wood and as good cotton wood as there was on the property and I believe I am correct in the fourteen hundred acres that there was a million eight hundred and forty-nine thousand feet of cotton wood and in my opinion—I based my estimate on acres—calculation on acres destroyed on a strip averaging four hundred and fifty feet wide through this property. However, the map points out they destroyed much more than

that. If that map is to scale, four hundred and fifty feet wide and four miles long, and my calculation is two hundred and nineteen acres.

[fol. 158] Q. Actually destroyed?

A. Actually destroyed. I believe the destruction exceeded four hundred and fifty feet. In some cases it went as far back as seven hundred feet.

Q. Taking into account the total number of feet of cotton wood, one million eight hundred thousand, how would that average out per acre as to quality and density of this particular area?

A. It would average out twenty-five hundred, twenty-six hundred feet per acre which is not the best timber in the world but it is pretty doggone good timber.

Q. Just one other question: You have estimated twenty-five hundred feet on the Excelsior tract. Are you in a position to estimate the number of feet per acre on the one hundred acres which you say was destroyed on the other plantation?

A. No, sir, I would not be because we didn't estimate that, as I recall, in the purchase of that property. I do recall the density of it and the quality of it because I had this logging operation over there and I don't believe we had the cruiser to estimate that.

Q. Did you cause an estimation or cruise to be made of the cotton wood and other timber on the Excelsior tract?

A. Yes, sir.

Q. Who made that cruise?

A. Mr. Jerome H. Summers.

Q. I hold in my hand four small photographs, which for the purpose of further identification I am going to mark "P-8", "P-9", "P-10" and P-11"?

I ask you to examine these from "P8" "P11" and state what they show?

[fol. 159] A. "P11" is a picture of myself standing beside a cotton wood tree that had been pushed over by the tree dozer.

"P-10" is a section of the cleared land looking from the back of the clearing toward the levee showing numerous stumps that have been broken off that the bulldozer wasn't able to push out.

Q. On which plantation?

A. Excelsior.

Q. Was the first one on Excelsior?

A. Yes, sir.

"P-9" shows a picture of David B. Forrester, Vice President of the General Box Company, who was Manager of the Natchez mill, standing along a wind row where the bull-dozer pushed the timber and, as I explained a little while ago, it showed the splintered condition of the timber after the bull-dozers finished with it.

"P-8" shows the area of clearing looking from the north to the south down the levee and showing the splintered condition of the timber and total destruction.

Q. Do those last two pictures refer also to the Excelsior tract?

A. All of them are taken on Excelsior.

Q. When were those pictures made?

A. In late 1947.

Q. Were you present when they were taken?

A. Yes, sir.

Q. Do you recognize from your independent memory that they correctly reflect what was shown there at the time the pictures were made?

A. Yes, sir.

[fol. 160] Mr. Benton:

In connection with the testimony of the witness, we desire to offer and file in evidence the said photographs marked "P-8" to "P-11" inclusive.

(Whereupon the above described photographs were marked "P8" to "P11" inclusive and filed in evidence with the Clerk.)

Mr. Kenton:

Tender the witness.

Cross Examination.

By Mr. Fleniken:

Q. Mr. Mullens, how frequently were you over this area while you were superintendent for the General Box Company?

A. Well, at that particular time I was not down too frequently or I wouldn't have let this thing go along too far there.

Q. When did you first obtain notice of the fact they were cutting this timber?

A. I believe it was September 12th or September 13th. If I am not mistaken I sent my logging crew to the site on September 13th.

Q. How far had the work progressed at that time?

A. Approximately halfway down the Excelsior tract. I don't know your levee stations down there, but approximately halfway through the operation on the R. B. Sharp property.

Q. Were there any operations going on anywhere else on the plantation at that time?

A. I wouldn't be positive whether it was in operation or not. I believe there was an operation going on on the [fol. 161] north end of Roseland when we went down there by Pioneer Contracting Company.

Q. But you made no effort to salvage any timber on the Roseland plantation at all?

A. No, sir, because it had all been pushed over when we got there.

Q. Mr. Mullins, I hand you a document marked for identification and filed in evidence as "P-2" and ask you if you were not familiar with that blueprint?

A. Yes, sir.

Q. You see here what the blueprint shows with reference to the timber along the line of the levee there?

A. Yes, sir.

Q. And you see that this cotton wood here is estimated from sixteen to twenty-five inches; is that true?

A. Yes, sir.

Q. About how far does that extend from the west side of the property the General Box Company was interested in?

A. State your question again?

Mr. Fleniken:

Read the question, please.

(Whereupon the last question was read by the reporter.)

By Mr. Fleniken:

Q. That is the cotton wood size sixteen to twenty-five inches.

A. What do you mean "from the west side"?

Q. This would be west; is that true (indicating)?

A. Yes.

[fol. 162] The Court:

As you look at the blueprint the top of it is north?

The Witness:

That is right, yes, sir.

I would say that is approximately a mile across there. There is six hundred and sixty acres in the tract of land lying between the—wait a minute, you got this wrong. We are not interested in anything down this way (indicating).

This is where the General Box Company is interested (indicating). This is the bottom of your map, going southward. This is the top of your map (indicating).

By Mr. Fleniken:

Q. This area here is not in the interest of the General Box Company (indicating)?

A. The General Box Company owns timber from this point to this point (indicating).

Q. This would be of interest to you, wouldn't it (indicating)?

A. You asked me how far it was west—

The Court:

Put it this way: Is that red or brown on there?

The Witness:

That is red.

The Court:

I- effect, you state that the plaintiff's claim is the ownership of all the land that is included in the red coloring on that blueprint?

[fol. 163] The Witness:

I contend that the plaintiff owns from the levee to the Mississippi River in its entirety.

By Mr. Fleniken:

Q. And the red area is the area where the timber was damaged and destroyed under your contention?

A. That is true.

Q. What I am trying to arrive at is the distance from this point, which is the end of the red coloring on the west side, to the point where the dotted line ends which encloses the words "cotton wood sixteen-twenty-five inches"?

A. There also is timber in this area (indicating).

The Court:

"This" does not mean a thing on that record unless you indicate where it is on that plat.

The Witness:

There was cotton wood timber of very godd quality—the best on the property stood right here, sixteen to twenty-five inches (indicating).

The Court:

What do you mean by "right here"? The extreme west end of that red coloring?

The Witness:

Yes, sir, that was the largest cotton wood on the property.

The Court:

He measures about two and one-half inches towards the west end.

[fol. 164] By Mr. Fleniken:

Q. From where this dotted line ends that encloses the words: "Cotton wood sixteen-twenty-five inches", about what distance is it from there to the next dotted line along the red area going east?

A. The scale is four inches to the mile and I am judging that would be two inches. It would be a half mile.

Q. Your plat shows that to be scattered hardwood timber, doesn't it?

A. Yes, sir.

Q. Beginning at that point and continuing east along the red area—

The Court:

Beginning at the east end of the area and extending east.

By Mr. Fleniken:

Q. —and enclosing the words "poor cotton wood six-twelve inches:" that indicates the cotton wood was only from six to twelve inches in diameter, doesn't it?

A. Not necessarily.

Q. What does it indicate?

A. The majority of the cotton wood there was six to twelve inches.

Q. Beginning at the east point there and continuing east to the next dotted line, what was in that area?

A. The same as in the area you just pointed out. It is typed as "poor cotton wood six-twelve inches".

Q. Doesn't your plat show that to open there and no timber at all?

A. From here to here? (indicating)

Q. Yes.

[fol. 165] A. Yes, it does.

Q. Beginning at the east point there and continuing east which encloses the words "poor cotton wood six-twelve inches"; what does that indicate?

A. Cotton wood timber with a majority of the trees there being six to twelve inches in diameter.

Q. And beginning at the east point there and continuing to the next dotted line along the red area, that is open area again, isn't it?

A. No, sir.

Q. What is that? That is what your plat shows?

A. That is what the map shows.

Q. Continuing at the east point there over along the red

area the next dotted line east, we find the words "scattered cottor wood", don't we?

A. Yes, sir.

Q. That indicates that was varying sizes, doesn't it?

A. It was not as thick on the ground as it was in this area here (indicating). That indicates the cotton wood was not as thick on the ground as it was in this area or some of these other areas in here (indicating).

Q. Beginning at the east point there and continuing along to the next dotted line east and north, what do you find in there on your plat?

A. Cotton wood six to fourteen inches deviation.

Q. And then beginning at the east point there and continuing on to the extreme east point, which is the east limit of the General Box Company's properties there, what do you find?

A. Cotton wood timber, twenty inches.

Q. This plat covers both the Excelsior and Home Place and the Roseland Plantation?

A. Just Excelsior.

[fol. 166] The Court:

In other words, all of that coloring on that plat is Excelsior?

The Witness:

That entire map was Excelsior, nothing else on it.

The Court:

All right.

By Mr. Fleniken:

Q. Now, Mr. Mullins, referring to the aerial photograph identified in evidence here as "P-5", I will ask you again if the east limits of the General Box Company property—tell me if you don't find here that you have a vacant area of several hundred yards?

The Court:

If you don't indicate where this is on the map, that won't mean a thing in the record. You can point it out by numbers of the sections.

By Mr. Fleniken:

Q. In Section 16, Township 4, North, Range 9 East, as shown on the aerial photograph?

A. Yes, sir, there is an open space.

Q. How long a strip is that vacant there?

A. Approximately twenty-five hundred feet from here to here (indicating).

Q. And then in the east corner of Section 15, the same township and range, do you not find a vacant area through there with practically not timber at all?

A. Yes, sir.

[fol. 167] The Court:

That extends from 15 into Section 14?

The Witness:

Yes, sir. There is some timber there, however. There are some trees you can see on the map. It is not void of trees by any means.

By Mr. Fleniken:

Q. Then again over in Section 13, the same township and range, do you not find a vacant section through there?

A. That is not a vacant section. That is a bayou.

Q. And then in the East corner of Section 13 and west half of Section 13, isn't that a vacant section?

A. No, sir.

Q. What do you find there?

A. There is timber—there is as good timber as you want to see across there. There is a vacant space there (indicating)——

The Court:

He is pointing to a part in Section 12.

The Witness:

A part in Section 12.

This is not vacant, no, sir.

By Mr. Fleniken:

Q. You did not make any tabulation of this timber yourself at the time it was purchased by the General Box Company, did you?

A. Yes, sir.

Q. You did?

A. Yes, sir.

[fol. 168] Q. Where are your records of the density of the timber on the different areas there, Mr. Mullins?

A. Right here. I always have to make inspections of a piece of timber before I would be able to purchase the timber.

Q. You mean you made no written estimates?

A. I caused estimates to be made, yes.

Q. Where are those estimates?

A. I believe that they are some where in some of these files these attorneys have. I do not have them.

Mr. Benton:

We are going to produce them.

The Witness:

I am not connected with the General Box Company at this time.

By Mr. Fleniken:

Q. Did you actually purchase any of this land yourself, Mr. Mullins; on either one of these plantations for the General Box Company?

A. I purchased all of it.

Q. Did you pay a fair and reasonable price for it to the people you bought it from?

A. I think so. I don't know of any of them being dissatisfied.

Q. On one of these plantations you purchased not only the timber but you purchased the fee, didn't you?

A. Yes, sir.

Q. The land and one-half of the mineral interest?

A. Yes, sir.

The Court:

Which tract was that?

[fol. 169] The Witness:

Roseland Plantation.

By Mr. Fleniken:

Q. Did you purchase the timber on the other plantation which, I believe, you identified as Excelsior?

A. Excelsior. I did purchase the timber for a period of ten years.

Q. And you paid a fair and reasonable value for that, I presume?

A. Yes, sir.

Q. And that was exclusively timber. You did not buy along with that the fee to the land or any mineral interest at all; is that right?

A. That is right.

Q. Is your estimate of the value of this timber based on the kind of timber that was on that property?

A. Yes, sir.

Q. And what was the most valuable timber?

A. Cotton wood.

Q. And what is next?

A. On that piece of timber?

Q. On that piece of timber?

A. Gum.

Q. And then I believe you said there was some other, probably pecan timber on there?

A. We did not buy the pecan. That was excluded.

Q. Had any of this land ever been cut over, Mr. Mullins, before or had it ever been burned over prior to the time you purchased it?

A. It had not been burned. It had been cut.

Q. How long prior to this time?

A. I don't know. I believe it was sometime in 1935.

[fol. 170] Q. Your estimate of $18 per thousand was based on this being cotton wood, or gum, or what?

A. Cotton wood.

Q. And if there was other types of timber in there it would depreciate in value; is that true?

A. Not necessarily. If it was classed as veneer timber, it wouldn't depreciate. However, if there was inferior grades of timber, naturally it would depreciate but, as I said before, we set up a stumpage value on a piece of property at a figure and we stick to that regardless of what specie it was. You couldn't change your figure every other day on it because you were cutting some other specie.

Q. Do you know of your own knowledge whether or not this land was taxed—was on the tax roll for the year 1946 in the name of the General Box Company?

A. Which land are you speaking of?

Q. I am speaking of the Excelsior and the Roseland Plantation?

A. No, sir, they were not. The General Box Company did not purchase them until late 1946.

By Mr. Clarke:

Q. Mr. Mullins, in connection with your conversation with Mr. Farmer, I believe you say you commenced your salvage operations about what date?

A. As I recall, about September 13th.

The Court:

Of what year?

The Witness:

1947.

[fol. 171] By Mr. Clarke:

Q. They were doing the work on the Excelsior and Home Place?

A. Yes, sir.

Q. Did you at that time make any contact with the Pioneer Contracting Company who was operating on the project north of there, or the Roseland Plantation?

A. I did not.

Q. Did you know they were operating up there?

A. Absolutely.

Q. You did, but you never did contact them or make any effort?

A. I had no reason to contact them because the destruction to the timber had been completed.

Q. You mean at the time you went down to see Mr. Farmer, the Pioneer Contracting Company had completed the clearing of all of its right-of-way?

A. I wouldn't say they completed all of it but they had completed the large borrow pit behind the levee on the north end.

Q. Didn't you say you didn't go down there, Mr. Mullins?

A. No, sir, I did not.

Q. Can you estimate as to the approximate percentage of the Roseland Plantation that had been cleared at the time you went down to discuss this operation with Mr. Farmer?

A. Yes, sir. I would say that there was eighty-five to ninety percent of the clearing that had been done.

Q. Eighty-five to ninety percent?

A. Yes, sir.

Q. And all of the timber in that area had been destroyed beyond salvage in the Roseland Plantation?

A. Yes, sir.

[fol. 172] Q. You don't know of any conversation of agreement that anyone of your employees might have had with the Pioneer Contracting Company with reference to salvaging timber?

A. I know of none.

Q. Go back to the Excelsior and Home Place timber. I believe that is the timber that you acquired with the right to remove within twenty years or ten years?

A. Ten years.

Q. And it had to be eighteen inches and up?

A. At the time of cutting.

Q. At the time of cutting?

A. Yes, sir.

Q. When you conducted this salvage operation, did you or did you not salvage timber less than eighteen inches?

A. What is your measurement, Mr. Clarke?

Q. The stipulation is set forth in your deed and I believe it is sixteen inches from the ground.

A. I couldn't be positive whether we did or didn't be-

cause it was the manner in which we had to cut the timber. We salvaged everything we could salvage.

Q. Regardless of its size?

A. Regardless of its size.

Q. Therefore, in that three hundred and sixty thousand feet of timber that you say you salvaged—three hundred and thirty thousand feet of timber that you salvaged from one-half of the Excelsior property, in that was also included timber you did not actually own under your contract?

A. I would say we did own it under the contract. We own all the timbers we cut. I say that because any tree measuring ten inches at the time of the purchase ... nally [fol. 173] would have grown into the property of the General Box Company within the period of its contract. I say we did own it.

Q. You had no right to remove it at that time?

A. We had no right——

Mr. Benton:

I object to that as a legal question, if Your Honor please, as to whether they had a right when they were seeking to diminish their damages after the trees were cut and were fixing to be destroyed.

The Court:

It is a legal question but I think it is proper on cross examination to find out just what his contention is. The Court is not bound by the contention.

I think the question is proper and the objection is overruled.

Mr. Clarke:

Will you read the last question, please?

(Whereupon the last question was read by the reporter.)

The Witness:

I think we would have a right to remove the timber, yes, sir.

By Mr. Clarke:

Q. But the fact is you did remove all timber from that land regardless of the size if you thought it had any commercial value at all?

[fol. 174] Mr. Benton:

I object to the question on the ground the language is not properly phrased.

The Court:

Objection overruled.

Mr. Benton:

There was no cutting of timber. There was a salvaging of the timber.

The Court:

Go ahead. I have ruled on it.

The Witness:

Will you state the question?

(Whereupon the last question was read by the reporter.)

The Witness:

We salvaged everything we could salvage after the timber had been pushed over, yes.

By Mr. Clarke:

Q. I believe you stated this morning the average growth of cotton wood of that sort was possibly six-tenths of an inch a year; is that correct?

A. Minimum, yes.

Q. And you had ten years to remove the timber from the land?

A. That is correct.

Q. Therefore, according to your calculation, you would [fol. 175] never acquire ownership of any timber that measured sixteen inches from the ground less than twelve inches?

A. That is correct.

Q. You don't remember any conversation that you might have had with Mr. Farmer or with his partner, Mr. Walter Green, regarding your opinion as to the salvage operations on the Excelsior portion of the project, do you?

You remember having any conversation with either of the two?

A. I had several conversations.

Q. After you had commenced your salvaging operations?

A. Yes, sir.

Q. Did you express any dissatisfaction as to the manner in which the oper ons were being conducted?

A. Absolutely.

Q. What was the nature of your complaint?

A. My complaint was that—here is a company that went down and bought and paid for timber——

Q. I don't mean that, Mr. Mullins. I mean were you complaining with Mr. Farmer or Mr. Green as to the manner in which they were attempting to salvage this timber for you after you had gotten with them?

A. They were not attempting to salvage anything for me. As I said this morning, Mr. Farmer was very cooperative and the fact that he would push only the smaller trees down and leave the larger trees provided that I stayed one hundred yards ahead of his machine—if I didn't s-ay one hundred yards ahead of his machine then he would have had to push all timber off. I had no complaint.

Q. Did you complain to him to the effect that he could be more careful in saving these trees?

[fol. 176] A. No, I didn't make any complaints.

Q. In order to clarify what you have had to say, am I correct when I state that you testified a few moments ago that there was approximately twenty-five hundred feet of timber per acre growing on the land which was cleared?

A. No, sir, I did not say that.

Q. What was your testimony?

A. Over the entire property which was three thousand four hundred and fifteen acres, there was approximately fourteen hundred acres of cotton wood timber. By that I mean the type—it was typed as cotton wood and on that fourteen hundred acres as I recall these figures I am trying to recall from the estimate—there was a million eight hundred and forty-nine thousand feet of cotton wood.

Q. On the entire Excelsior tract?

A. On the fourteen hundred acres—approximately fourteen hundred acres of cotton wood that was typed. I made the statement I thought it would run in that particular area

about twenty-five hundred feet per acre over the entire acreage.

Q. Taking that as an average, then as pointed out on that blueprint, would that area have been an average area?

A. It would have been a little above the average, yes, sir.

Q. I noticed in your deeds here they refer to the Home Plantations. When we say "Excelsior", does that include the Home Place?

A. It is one and the same properties, all purchased from Mr. R. B. Sharp, at the same time. There is no distinction whatever made in it.

[fol. 177] Mr. Fleniken:

If Your Honor please, we would like to have about five minutes before we proceed any further.

The Court:

I usually take a recess about 3:15, Mr. Fleniken.

If you want to call him back for further cross-examination, I will permit that.

Mr. Clarke:

That will be all right.

Redirect examination.

By Mr. Benton:

Q. Mr. Mullins, I want you to again view this aerial photograph. Have you a fountain pen?

A. Yes.

Mr. Benton:

With your permission, Your Honor, I want to have the witness place a mark on this map at or about the point where you say the salvage operation began.

By Mr. Benton:

Q. Just put a cross at or about the point on the yellow line, or red line—let us get the directions straight in your mind.

This is the north, south, east and west (indicating).

The Court:

Somebody said that was not made according to the compass. Is that map north and south as you look at it from top to bottom?

[fol. 178] Mr. Benton:

Approximately, and I am holding it correctly.

By Mr. Benton:

Q. Indicate on this map about the point where the salvaging process began?

The Court:

The witness puts an "x" with a pen and his own initial.

By Mr. Benton:

Q. Now then, the salvaging process began at that point and went downstream to the west?

A. Yes.

Q. And it was within that area from that point to the western boundary of your property that there was at least one area of twenty-five hundred feet in which there was no timber at all; is that correct?

A. Yes, sir.

Q. Mr. Mullins, did you, as logging superintendent, did you keep an accurate and complete record of the timber which you salvaged?

A. Yes, sir.

Q. Is there any doubt as to the statement you made that you did salvage three hundred and thirty thousand feet from that area?

A. It is not the exact figure, but it is three hundred and thirty thousand three hundred and some feet. We must keep those records for the Louisiana Severance Tax and Mississippi Severance Tax and various and sundry reasons.

Q. What percentage of the timber on this area between the blue line and red line was cotton wood timber?

[fol. 179] A. I would say it was one hundred percent cotton wood.

Q. The map shows that it was made sometime in 1945—November 1945. The actual aerial photograph was made in

November, 1945. These lines were placed on the map after this cutting operation took place.

What growth would have occurred in these trees between that time in 1945 and the time when this destruction occurred?

A. A minimum growth would have been 1.8 inches for the three year period. I think this particular area, I recall having taken some samples, that this timber grew much faster than six-tenths of an inch per year. In that period there you have there growing seasons—we had two growing seasons.

Mr. Clarke:

We object to that testimony for the reason he is commencing his period there from 1945 when their own documents show in one case the property was acquired in 1947 and the other in September 1946.

Mr. Benton:

Those dated have nothing to do with what I am talking about. I am trying to indicate the change between the actual conditions and when the map was made.

It is rebuttal testimony as to what the government is trying to show as to extent of growth of the land. They showed him a map dated 1945.

The Court:

Don't you know I can't tell anything about that timber from the aerial map?

[fol. 180] Mr. Benton:

That is true.

The Court:

You were entitled to what timber was there when you bought it.

Mr. Benton:

That is correct. I am entitled to what timber was there when it was cut.

The Court:

And then if it was cut in that same year there wasn't much leeway for it to grow when you bought it.

Mr. Benton:

It is all right to leave it like it is.

The Court:

All right.

By Mr. Benton:

Q. When you first found out this cutting was going on, I understand from what you have already testified, you went down and talked to Mr. Farmer, representing Blanks Construction Company; is that correct?

A. Yes, sir.

Q. At that time, what was your main point of discussion —your main point of contention with him when you first went there to try to salvage the timber?

A. The previous day I had tried to send a logging crew to saw the timber in a general method and the Blanks Construction Company had stopped my logging crew. I went [fol. 181] down the next morning with my crew myself.

Q. Did the Blanks Construction Company ever consent to your logging any part of that timber in the regular way?

A. No, sir.

Q. Did they ever at any time during the course of their prosecution of this work afford you any opportunity to regularly cut and remove those logs?

A. No more than the five or six I got before he could stop me.

Q. Was there ever any agreement on their part that allowed you to do anything other than to salvage those logs after they were pushed down?

A. No, sir, that is the only agreement they made.

Q. When you say Mr. Farmer did show cooperative spirit and you had no controversy with him thereafter, what do you have in mind? Do you mean by that you were fully satisfied as to what he was doing?

Mr. Fleniken:

I object to counsel leading his witness.

The Court:

You are grossly leading him.

Mr. Benton:

Strike out the last part of the question.

By Mr. Benton:

Q. What do you mean by that?
A. Ask the question you want me to answer.
Q. The question is that you mentioned the fact that he was cooperative?
A. Yes, sir.
[fol. 182] Q. And you had no further argument with him?
A. Yes, sir.
Q. Exactly what do you mean by that in so far as it relates to the rights of your company?
A. I, as logging superintendent, felt we owned the timber.

The Court:

What you mean to say was he cooperated with you within his requirements.

The Witness:

Within his requirements. He wouldn't let me cut the trees because he couldn't push the stumps out like he could the trees.

Mr. Benton:

That is all.

Recross-examination.

By Mr. Clarke:

Q. Isn't it a fact when Mr. Farmer and you had your discussion, you were benefited by the manner in which he cleared out and swamped out these trees? Wasn't the merchantable timber more accessible after he cleared up around the trees?

A. No, sir.

Q. Did it make your operations more difficult?

A. Anything done with that bulidozer, Mr. Clarke damaged the timber. Anytime you cut a tree standing up——

Q. I am asking you this:

[fol. 183] Mr. Benton:

The witness has a right to answer the question.

The Court:

Let him answer the question.

By Mr. Clarke:

Q. I asked you whether or not the clearing out of the undergrowth and making the trees more accessible; whether or not that was of any benefit to you?

A. No, sir.

Q. Did he clear out around the trees?

A. Yes, sir, he cleared the whole ground—all of it.

The Court:

He means before he pushed them over, Mr. Mullins?

The Witness:

Yes, sir; he did that.

Mr. Clarke:

That is all.

Mr. Benton:

That is all.

The Court:

Next witness.

[fol. 184] JEROME H. SUMMERS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Benton:

Q. State your name, sir?
A. Jerome Summers.
Q. Where do you live?
A. Walls, Louisiana.
Q. What is your business, Mr. Summers?
A. Farmer, at present. I also am a forester and timber estimator.
Q. What are your qualifications as a forester and timber estimator?
A. I finished Louisiana State University in 1939. I worked for the Mangle Company as timber estimator and buyer from 1939 to 1946 and from then I did contract estimating for various companies, including the General Box Company, up until the last two years in which I have been estimating timber and farming.
Q. Did you make a cru-se and estimate of certain timber on the property referred to in this case as the Excelsior and Home Place plantation?
A. Yes, sir.
Q. When was that cruise and survey made?
A. It was made in December 1946.
Q. For what purpose was it made?
A. For General Box Company to acquire the timber in order to allow them to negotiate for the timber.
Q. Did you make a written report to the General Box Company about that, sir?
A. Yes, sir.
[fol. 185] Q. Do you have that report with you?
A. I have it right here, yes, sir.
Q. Would you hand me that report, please, sir.

Mr. Benton:

In connection with the testimony of the witness we offer and file in evidence said report which is otherwise referred to——

Mr. Fleniken:

Let us examine it.

Mr. Benton:

Excuse me.

I wanted to identify it—otherwise referred to as the R. B. Sharpe tract revised January 27th, 1947. It is o two pages signed by Mr. Summers with certain documents and individual data attached thereto.

By Mr. Benton:

Q. In examining these papers that are bound together, I find what appears to be a second sheet which is evidently a first report dated December 18th, 1946. Did you make that?

A. There was some controversy about gross figures which Mr. R. B. Sharp, in his negotiati-ns with Mr. Mullins and Mr. Forester of the General Box Company found some error I made. I don't remember exactly how that came about but I do know I spent another day in Natchez with Mr. Mullins and Mr. Sharp and we revised the gross figures on a number of trees and corrected my error. The revised estimate is the correct estimate and you can throw the other away.

[fol. 186] Q. This is a complete record of what you did in estimating the timber?

A. Some of those figures in there aren't mine.

Q. I wish you would examine the cocument and show me what figures are yours and what figures are not yours?

A. These two pages are mine. This drawing is mine.

The Court:

You might number the pages and say which one of those are yours.

The Witness:

One and two are mine.

By Mr. Benton:

Q. What else?

A. This tracing is mine.

The Court:

What page?

The Witness:

Page three. Page four and page five.

By Mr. Benton:

Q. Is this yours?

A. Yes, sir, page six and page seven.

Q. Dated December 18th, 1946?

A. Yes, sir.

Q. Now, I show you these documents again as corrected and containing sheets one to seven both inclusive, and ask you if this is the written data that was prepared by you, including the revised report you made of the estimate of the [fol. 187] timber on the property in question?

A. Yes, sir.

Mr. Benton:

If there is no objection, in connection with the testimony of the witness we would offer and file in evidence the series of documents designated one to seven, both inclusive, and give it the offering number "P-12".

(Whereupon the above described document was marked "P-12" and filed in evidence with the Clerk.)

By Mr. Benton:

Q. Generally, what kind of of timber did you find on this plantation?

A. More cotton-wood and willow than anything else—some gum, sweet pecan, Hackberry—probably a little red oak.

Q. What pe-centage of the timber over the whole area was cotton wood?

A. About fifty per cent—forty to fifty per cent.

Q. You remember the location of the old levee in connection with this property?

A. Yes, sir.

Q. Do you remember the location of the old borrow pit in connection with this property?

A. Yes, sir.

Q. Have you had a chance here in Court to examine this large aerial photograph of this property? We are speaking now of the Excelsior and Home Place?

A. Yes, sir.

[fol. 188] Q. And is the area included between the blue and red lines on this map?

A. Yes, sir.

Q. Do you recall the kind of timber that was located in that area when you made that survey and analysis?

A. I would say ninety-nine per cent cotton wood. There was one area that possibly could have a little bit of sycamore and hackberry. I would say, for all practical purposes, it was one hundred per cent cotton wood.

Q. What have you got to say as to the relative growth and maturity of cotton wood in this area as compared with the remainder of the property?

A. I know it is better than average. On this property you had cotton wood on a total of one thousand nine hundred and thirty-three acres. Of that one thousand nine hundred and thirty-three acres, one thousand three hundred and eighty-one acres was cut-over hardwood with a little bit of mixed cotton wood on it—possibly about two hundred feet per acre—the remaining area of five hundred and fifty-two acres were principally where the majority of the cotton wood stood. Of this area, it would average about two thousand feet of timber per acre and I can certainly say from my field notes and what I can recall and looking at the blueprint that this area along the levee is as good or a little better than the average of the five hundred and fifty-two acres that was principally in cotton wood.

Q. Taking into account the factors you mentioned, are you in a position to estimate the number of feet of cotton wood which was located in this area between the blue and red lines?

[fol. 189] The Court:

Is that talking about the Excelsior tract?

Mr. Benton:

That is the Excelsior tract, yes, sir.

The Witness:

Will you state your question again?

By Mr. Benton:

Q. Taking into account what you just said, can you estimate for the benefit of the Court and the record the number of feet of cotton wood per acre in this area shown on this aerial photograph of the Excelsior tract lying between the blue and red lines?

A. Well, as close a guess as I could make—it is a guess or estimate—I would say about twenty-five hundred feet per acre of cotton wood.

Q. Does your business as a forester and as a timber estimator make it necessary that you should remain familiar with the market price of lumber?

A. Well, it has been.

The Court:

You mean lumber or timber?

Mr. Benton:

Timber.

The Witness:

Maybe not necessary, but I have done it anyway.

By Mr. Benton:

Q. Are you in a position to say whether you were familiar with the market price of this standing timber on this area we are talking about in the fall of 1947?

[fol. 190] A. Yes, sir.

Q. What was the market price?

A. I would say $18 was a good average market price on the class of cotton wood timber that was there.

Q. Upon what do you base that statement?

A. I base it on the fact that right along at the same time I sold the General Box Company twelve million feet of timber, at least sixty percent of it cotton wood, from $17 to $20 a thousand.

Q. At that time?

A. At that time, yes, sir.

Q. When you speak of an average of twenty-five hundred feet per acre on this area of cotton wood, do you have in

mind the merchantable timber on the property or all of the timber on the property?

A. I am speaking of the merchantable timber that could have been cut under their contract.

Q. You are speaking then about the timber that was eighteen inches in diameter, sixteen inches above the ground; is that correct?

Mr. Fleniken:

If Your Honor please, I object again to counsel leading his witness.

The Court:

He is more or less an expert, Mr. Fleniken.

Mr. Fleniken:

I realize that, Your Honor, but his questions—

Mr. Benton:

I will withdraw the question.

[fol. 191] By Mr. Benton:

Q. Just state to the Court what you mean when you say twenty-five hundred feet in that area?

A. There was twenty-five hundred feet of merchantable timber that could have been cut which was breast high, which is probably eighteen inches and up, sixteen inches from the ground, "breast high" being a forester's term for being four and one-half feet from the ground.

Q. The title in the record shows the General Box Company had the right to remove timber of that size that you have just mentioned, eighteen inches and up, sixteen inches above the ground, over a ten year period from the date of the purchase.

Can you give the Court an estimate as to the timber on that area in 1947 when this timber was destroyed of sufficient growth under the size of eighteen inches at that time but which would have attained the growth of eighteen inches within the ten year period?

A. There was an average of around fifteen young trees per acre. When I say "fifteen young trees per acre" I am talking about the average on the whole five hundred

and fifty-two acres. Those young trees were of a size that would grow into merchantable timber, in my opinion, during the ten years.

Q. What was the minimum size of those trees?

A. Twelve inches.

Q. When you say "fifteen" of such trees per acre, what does that mean in feet?

A. About two thousand two hundred and fifty.

Q. Per acre?

A. Per acre.

Q. What would be the value of that timber as it stood there at that time in 1947 when it was destroyed?

[fol. 192] A. The only way I know how to arrive at the value of growing timber is take the estimated value that timber would be when it became merchantable and discount it back to the present date. Taking for granted it would still be worth $18—

Q. You would have to make certain assumption?

A. You will have to make a few calculations. I can't do that.

Q. What percentage of discount would apply on arriving at a basis?

A. Probably about two or three percent. Discount about three percent.

Q. Do I understand that to mean—assuming a hypothetical case which I ask you as an expert—if there were a tree ten inches in diameter on that property when it was destroyed in 1947—

A. Let us take one twelve inches.

Q. Let us take one twelve inches in diameter. What would be its maximum growth ten years later?

A. Well, it would be a sixteen inch tree average on that property down there. That property, according to the best of my opinion, was growing about at the rate of six-tenths of an inch per year and that is what I told General Box Company it was growing.

Q. That wouldn't be in the contract?

A. That is right. I told you to change it from a ten to a twelve inch tree.

Q. A ten inch tree would not reach that size in that time?

A. No, sir.

Q. When you say "fifteen trees", do you mean trees twelve inches in diameter and up?

A. Yes, sir. I am sure that is right. You have all the figures in that report and you are asking for a lot of figures, but I am sure it is right.

Q. The report is in the record.

[fol. 193] Let us assume the case of a twelve inch tree that was destroyed in 1947 when this cutting took place. If that tree were permitted to grow during a ten year period it would attain a minimum of eighteen inches in your estimation?

A. Yes, sir.

Q. To compute the value of that tree in 1947, you would have to discount thirty percent off, three percent a year?

A. You would have to take about thirty-five percent.

Q. In the same proportionate way, by the same method of discount, you would determine the value of the other trees depending on the time when they would attain that minimum growth of eighteen inches?

A. Yes, sir.

Q. Just considering the over-all factors in the case as to the fifteen trees per acre that you have given as to their maturity and size and the rate of growth, can you give the Court what would be the average value of those trees per thousand feet as of the date when this cutting took place in 1947?

A. Say that again?

Mr. Benton:

Will you read my question, please?

(Whereupon the last question was read by the reporter.)

The Witness:

As I said, you would have to assume some figure—estimate some figure that the stuff would be worth in 1957 and it is reasonable to assume the timber will be worth [fol. 194] as much or more in 1957 because actually it is becoming more scarce as time goes on. Then if you discount at thirty-five percent, or three percent annually, you would have approximately eleven and a half to twelve dollars, somewhere in there.

By Mr. Benton:

Q. I admit it is a rather difficult question. You didn't actually make any determination of the size of these fifteen trees as to whether they were ten inches, eleven, twelve or thirteen inches?

A. Yes, sir, I have the trees numbered in that report.

Q. Then if we take your report and we average out the size of those trees as of that day, then we can make the calculation that would apply the formula you have just described to the Court, that is, make a determination of the average length of time it would require those trees to attain the minimum growth of eighteen inches and then make the discount of three percent from that day back to the day of the destruction.

Mr. Fleniken:

If Your Honor please, I didn't want to object while Mr. Benton was framing his question.

I object to the question for the reason it is entirely irrelevant and it is speculative and would be of no value in this case.

The Court:

I think it has, Mr. Fleniken, for this reason: Unquestionably I would think in the purchasing of a body of [fol. 195] timber, the purchaser would first take into consideration what is known as the merchantable timber, that is, timber sixteen inches, or whatever it is, that was on the land, and for a further part of the consideration he would be willing to pay for the timber below that diameter within a reasonable range of a period of time he had to cut it. While it was not as valuable as that ready to cut, it had some value and he is attempting to do what we have been doing in these damage suits when they figure out a man's life expectancy and earnings and I tell the juries they have to discount it back to its present value and that is what he is trying to do with this timber. I think it is permissible.

Mr. Fleniken:

If Your Honor please, really the way of estimating the value would be what it would sell on the open market

at that particular time—what it would sell for; what someone else would be willing to pay for it at that time.

The Court:

You may have some experts that will approach it in a different way, but that is one way to approach it. You couldn't sell timber not merchantable but any sawmill will buy timber and hold it for a short period of six months or maybe a year, but nevertheless it does have some value and that value enters into the purchase price and this is one way of attempting to fix its present value. You may have experts that will have some other theory but you are dealing with a practical proposition. It has an element of risk in it, but business is carried on and these lumber mills and owners of timber use those methods of deter- [fol. 196] mining the value of stuff when they buy it and it has proven satisfactory to both purchaser and seller and it is of a nature where you have to have some reasonable method of handling it that would not add tremendously to the cost.

If you have a large area of land with timber scattered and go out and take each tree and mark each tree and count each tree—that is sometimes done, I know, but it would add considerably to the cost of the timber because of what you have to pay those timber estimators and I think this is one way to do it.

Objection overruled.

Go ahead.

Mr. Benton:

Will you read my question, please?

(Whereupon the last question was read by the reporter.)

The Witness:

Yes.

Mr. Benton:

That is all: We tender the witness.

Cross-examination.

By Mr. Clarke:

Q. Mr. Summers, I hand you this document which you say is the report that you made to the General Box Company as to the estimate of timber on the Excelsior tract. [fol. 197] Is that the document there?

A. Yes, sir.

Q. Is this the latest one? I understand you made two. Can you check through them and tell me whether or not that is the latest of the two documents?

A. It is.

The Court:

That is page Number what?

Mr. Clark:

Page No. 1.

By Mr. Clarke:

Q. Will you please examine this document and state in total number of feet all the types of timber as you estimated growing on that property as of January 22nd, 1947?

A. The total estimate of all footage?

Q. Yes.

A. Two million six hundred and eleven thousand seven hundred and fifty.

Q. I noticed also in that report you entered into an estimation of the probable amount of cotton wood and willow that would be merchantable timber eighteen inches and up ten years from January 22nd, 1947; is that correct?

A. Yes, sir.

Q. What is your estimate as to the cotton wood that would be growing on this property ten years from the date of that estimate?

A. One million eight hundred and forty-nine thousand four hundred and twenty-two feet, but that is after a total amount of—can I take a second and add these two figures? [fol. 198] Q. Yes.

A. Eight hundred and seventy-five thousand feet of cotton wood had been removed at the time this thing was made.

In other words, they could have cut eight hundred and seventy-five thousand feet of cotton wood at that time sticking to eighteen inches and up, breast high. Then again in ten years I estimate they could cut another one million eight hundred and forty-nine thousand four hundred and twenty-two board feet, Doyle ruled.

Q. With reference to the willow, did you make an estimate as to the probable amount of timber that could be classified as merchantable timber above eighteen inches at the end of ten years from the date of that?

A. Yes, sir.

Q. What is that?

A. One million four hundred and twenty-four thousand feet. That is after they cut six hundred and fifty-eight thousand seven hundred and twenty feet of willow. They could have cut that in 1947 and cut the other one million four hundred and twenty-four thousand feet in ten years.

Q. Then, according to your estimate, all that the General Box Company would have been able to recover in timber would have been a total of this figure of two million six hundred and eleven thousand seven hundred and fifty, plus one million eight hundred and forty-nine thousand four hundred and twenty-two feet?

A. Yes, sir.

Q. Plus one million four hupdred and twenty-four thousand?

A. Yes, sir.

Q. Taking that group of figures, that amounts to how much—all those totals?

[fol. 199] A. Roughly six million feet of timber.

Q. Six million feet of timber?

A. I just took off a few odd thousand.

Q. The document shows you paid $36,000 for the timber on that property. Basing the estimation of present timber plus the future growth, how much would that amount to per thousand that you paid for that timber?

Mr. Benton:

If Your Honor please, if this testimony is elicited to merely test the accuracy and credibility of the witness, since he is on cross examination I guess it would be admissible, but if it is intended as primary evidence as bearing on the

question of the value of the timber destroyed, it is manifestly irrelevant and immaterial.

The Court:

I think the question is permissible. He is on cross examination, in the first place; and in the second place it is to test out those figures and tell us how those figures would jibe.

Mr. Clarke:

They arrived at $11 or $12 an acre and I am trying to find out how he got it.

The Court:

You cross-examine him.

Mr. Benton:

Are you going back and using the purchase prince of the timber?

[fol. 200] Mr. Clarke:

That is right. I am using the purchase price of the timber in trying to get some value he estimated that timber to be at the present time and ten years from now and the same way he did in the method you used.

The Court:

In other words, if he paid $36,000 in 1947 and the figures he has given here if counsel on cross-examination can show they are all out of kilter with the time, the Court would certainly consider that testimony on that score.

Mr. Benton:

This witness testified as an expert as to the quantity of the timber and as an expert he testified to the market value of the timber. Nothing has been brought out on direct examination that he had anything to do with the purchase of this particular timber, and if Your Honor is going to consider it relevant to allow that to be brought into this case as a criterion of the value of the timber, then it looks like we will have to go into a multiplicity of details that was

connected with the purchase of the timber to show it was an ~~unduly~~ favorable or unduly unfavorable acquisition.:

Suppose the General Box Company purchased the timber at a grossly exorbitant price as compared to the market value. I don't think that has any bearing on the market value at the time it was destroyed.

The Court:

Mr. Benton, I know of no better way to fix values. It is an opinion at l-ast, as to what the people experienced and [fol. 201] expert in the business think it is worth. It is an opinion.

I think it is relevant on cross-examination.

If there is any extraordinary situation, you can meet it.

Go ahead.

By Mr. Clark:

Q. Noticing your report, I note you make reference to the condition of the timber as being badly scattered, small and cut-over; is that correct?

A. Quite a bit of it is. That is why I say out on the borrow pit which, according to the blueprint I made, I don't show very much of it to be cut-over. There is some open land out *that* and there is a little bit that comes—but it is better than average.

Q. But you do say it is badly scattered and small?

A. Yes, sir.

Q. I believe also on your report you show forty percent of the cotton wood and practically all of the willow is less than twelve inches at the scale end of the log?

A. Yes, in taking those footages.

Q. I notice also in your report you say the cotton wood tree average was one hundred and nine feet?

A. Right.

Q. You also testified on direct examination that there were approximately fifteen trees per acre averaging eighteen inches and above?

Mr. Benton:

That is incorrect.

By Mr. Clarke:

Q. Or they would reach eighteen inches at the end of ten years?

A. At the end of ten years, yes, sir.

[fol. 202] Q. Was that in addition to this timber up here?

A. Yes, sir. You have a total of sixteen thousand nine hundred and thirty trees. Most of your footage comes in here. You have these trees, this nine thousand seven hundred and sixty trees ten to sixteen inches. Now, a ten inch tree will give you a sixteen inch tree four and one-half feet from the ground and you drop it down to sixteen inches to the ground and it would come in as a merchantable tree and he would be allowed to cut nine thousand seven hundred and sixty trees located on five hundred and fifty-two acres.

Q. Which would be how much, approximately?

What I would like to know is how many trees per acre eighteen inches and up——

Mr. Benton:

Let him make his calculation.

The Witness:

It is going to run around eighteen trees. I believe I killed a few when we cut the other timber out.

By Mr. Clarke:

Q. The figure I would like to have now is the number of trees per acre that were growing at the time of this estimate that were eighteen inches and above in diameter, sixteen inches from the ground? Can you give me that information?

A. You would like to have the number of trees eighteen inches and up, sixteen inches from the ground?

[fol. 203] The Court:

In other words, under the contract they were ready to be cut?

Mr. Clarke:

Yes, sir.

The Witness:

I have it ten to sixteen and eighteen to twenty-one.

By Mr. Clarke:

Q. That would be the figure, eighteen to twenty-one.

The Court:

How many of those?

The Witness:

How many trees per acre?

By Mr. Clarke:

Q. Yes.

A. Two thousand five hundred and forty and seven hundred and twenty is three thousand two hundred sixty of those trees. Some of those trees were scattered over that one thousand three hundred and eighty-one acres of——

Q. As an estimate?

The Court:

Acres of what?

The Witness:

Acres of cotton wood and cut-over hardwoods, that I mentioned to start that had approximately two hundred to [fol. 204] two hundred and fifty feet per acre and I have no definite figure on the number of trees. We would have to take this number of trees—you compute the two hundred feet per acre of cotton wood——

Q. That would be applied the same as in that area that was cleared for the right-of-way?

A. No, sir.

Q. Why?

A. Can I see the blueprint I made?

Q. Let us simplify it this way: Can you testify from your own knowledge approximately what was the number of board feet of timber growing in this particular area that was used for the right-of-way per acre that was eighteen inches and up, sixteen inches from the ground?

A. Two thousand to twenty-five hundred feet per acre.
Q. That is per acre average?
A. Yes.

The Court:

We will take a recess for ten minutes.

(Short recess.)

The Court:

All right, gentlemen.

By Mr. Clarke:

Q. Mr. Summers, I will ask you to examine that sketch there and state whether or not you know who was the person that prepared it?

The Court:

How are you going to identify it, Mr. Clarke?

[fol. 205] Mr. Clarke:

I believe this has already been identified as Page 3 of his report marked "P-12".

By Mr. Clarke:

Q. Do you know who prepared that sketch?
A. I did.
Q. I hand you a document that has been marked "P-2" and ask you whether or not this document has any connection with the sketch you say you have prepared?
A. It is a blueprint made from this so-called sketch which is a tracing.
Q. Both of them represent the same area and the same thing?
A. Same thing.

Mr. Clarke:

That is all.

Re-Direct Examination.

By Mr. Benton:

Q. Reference has been made to approximately fifteen trees per acre on this property which you testified would attain a minimum growth of eighteen inches within the ten year period.

Did you, in your revised report of January 22nd, 1947 make a calculation as to the growth that those trees would attain over the ten year period?

A. Yes, sir.

Q. And did you deal with those trees separately from [fol. 206] the trees which had attained the eighteen inch minimum at the time your estimate was made? You treated those trees separately from the eighteen inch trees?

A. Yes, sir.

Q. Will you take your report and refresh your memory therefrom and just state to the Court the number of trees that you found at the varying dimensions beginning with sixteen inches and going up to twenty-two inches of attained growth at the end of the ten year period and state the total number of feet of timber that would have been involved in those trees at the end of the ten year period?

A. Seven thousand eight hundred and eight of those trees that were less than eighteen inches diameter, breast high, at the time of estimating——

The Court:

That was on what area?

The Witness:

On the entire cotton wood area, Your Honor.

The Court:

All right, go ahead.

The Witness:

There was seven thousand eight hundred and eight of those trees which at the time I estimated were not eighteen inches in diameter, breast high, but would, in my opinion, reach eighteen inches in diameter, breast high, in ten

years. Those seven thousand eight hundred and eight trees had a board footage of one million eight hundred and forty-nine thousand four hundred and twenty-two board feet, Doyle ruled.

Does that answer the question?

[fol. 207] By Mr. Benton:

Q. Yes, sir.

What would that represent in board feet average for each of said trees?

A. When you add fifteen of those younger trees per acre, that would average two hundred and thirty-six feet per tree, seven thousand eight hundred and eight into one million eight hundred forty-nine thousand four hundred and twenty-two.

Q. If you multiply that by fifteen trees, which you say is the average number of trees, cotton wood in nature, over the area by that number of feet which is the average number of feet at the end of ten years, what would the average be per acre?

A. Thirty-five hundred feet.

Q. Assuming the market price would be the same at the end of the ten year period as at the time this destruction occurred, what would it make those trees worth at the end of the ten year period?

A. Those fifteen trees, $53.72.

Q. If you discount that at the rate of three percent, what would that make the net worth of the trees be at the item of the destruction?

A. Instead of saying three percent, if you took thirty-five percent of the amount and discount at the rate of thirty-five percent over a period of ten years, you would have $41.42.

Q. Per acre?

A. Per acre.

The Court:

You have that discount figure in the statute of the state.

Mr. Benton:

Yes, sir, I believe so.

[fol. 208] The Court:

We can take cognizance of that.

By Mr. Benton:

Q. Then in giving your estimate of the value of the smaller trees under eighteen inches on that property at the time of the destruction, you would use that figure and multiply by the actual number of acres in the area that was destroyed?

A. That is the only way I know how to do it.

Q. You are not attempting to make any estimate of the number of acres that was destroyed?

A. No, sir, I haven't seen the property since I estimated it.

Q. The estimates which we have just discussed pertain to all the trees, or cotton wood trees alone?

A. That is cotton wood alone we are discussing.

Q. Why do you say as to this area which was in close proximity to the old levee and the old borrow pit that that was, in your opinion, substantially one hundred percent cotton wood? What do you mean by that?

A. I mean there was no other specie in there. It was a pure cotton wood stand *which* the exception of one area on my blueprint I have marked "Cut-over cotton wood and hardwood" and if my memory serves me correctly there was a little bit of sycamore right along in there, but for all practical purposes it was one hundred percent cotton wood.

Q. I notice in this revised report of January 22nd, 1947 that in describing at the end of the ten year period which are the trees that were less than eighteen inches at the time your estimate was made, you refer to eighteen hundred trees of a diameter of sixteen inches.

[fol. 209] At what level do you have reference to there?

A. Down to breast high. That is four and one-half feet from the ground.

Q. What would the diameter of those eighteen hundred trees be at sixteen inches above the ground?

A. They would be at least eighteen inches because there is a considerable amount of taper which takes place in those trees.

Q. Mr. Summers, at the time you made this estimate you didn't anticipate there would be a lawsuit about this?

A. No, sir. I probably would not have took the job.

Q. Your business in making estimates has involved estimates made for timber companies buying timber?

A. Principally, or individuals selling timber.

Q. What is the rule in making an estimate of this kind as to the sound business policy and the practice estimators use in arriving at a determination of the number of trees in a given area?

A. The method used in this particular case was a line strip method, which is a method of sampling a certain percentage of the area, being sure that you are getting an average sample of the area. In this case, part of this was a ten percent estimate and part was a five percent estimate. The larger the area the smaller percentage of sampling, in general, you can make and still arrive close to the right answer.

Q. Did you do the necessary sampling here to enable you to arrive at the right answer?

A. Yes, sir.

Q. What means in making an estimate of this kind is attached to make certain the estimate is not excessive and rather conservatively arrived at?

[fol. 210] A. Sometimes it is excessive. If a timber estimator is too conservative today, then the company he does the estimating for doesn't get a chance to buy the property. Somebody else buys it.

On the other hand, he has to be careful if he doesn't overestimate it because then the company he does the work for buys the property and falls short.

So, in general, a timber estimator won't stay in business—he better get within ten percent, and preferably to have that be under ten percent and not the over.

Q. Do you believe you were within that ten percent limit here?

A. To the best of my knowledge.

Q. On your cross-examination some importance was apparently attached to the fact that there were approximately six million feet of timber of all kinds involved here and there was some comparison made between that amount

and the total price paid for this timber by the General Box Company.

Considering that you were dealing with cotton wood timber in an area of the nature here involved did you for the benefit of the company, make any calculation as to what percentage of that timber, cotton wood in character, might die during that ten year period?

A. I believe I knocked off one-fifth the number of the trees on that.

Q. You didn't reflect that in the figures, did you?

A. Yes, sir.

Q. When you say there was six million feet of timber of all kinds, does that take into account any discount you allowed over that period of time for trees that might die?

A. I took off one-fifth of the total number of cotton wood and one-third of the total number of willows. However, I [fol. 211] didn't take into account the fact that possibly half, and maybe three-fourths of that willow may never reach merchantable timber due to the fact that it is growing in a more or less low area and sometimes during high waters on the Mississippi River you can get a deposit of four or five feet of sand, or whatever it might be, around the willow and when that happens it will kill it. Then you start over with a new stand of whatever might come in, either willow or cotton wood.

Q. What is your experience or knowledge as to the average growth of cotton wood, particularly in this area up there where you made this survey?

A. I figure six-tenths of an inch per year was a safe figure they could use. I made no actual inclement bores in that timber. However, I have made a number of inclement bores up and down the Mississippi River and from some cotton wood logs I have seen cut in that particular area, from the general over-all appearance of the cotton wood timber, I was sure in my mind it would make six-tenths of an inch per year. I have seen it make an inch. Cotton wood is the fastest growing commercial specie in the United States.

Mr. Benton:

That is all.

Recross-examination.

By Mr. Clarke:

Q. Mr. Summers, when you gave your estimation as to the future amount of timber that would be growing on this timber tract ten year from January 1st, 1947, you arrived at that estimation based upon the fact that all the conditions [fol. 212] would be favorable so it would g-o- the timber?

A. All the conditions would be what they had been in the past—would be normal. "Normal" in that sense of the word, means average.

Q. Was that area subject to over-flow?

A. Yes, sir.

Q. And you could see the markings on the trees?

A. Yes, sir.

Q. Then you stated if a silt or any other deposit of any considerable depth had been deposited on this willow all of it could have been killed?

A. Yes, sir.

Q. What about the cotton wood?

A. Not very easily. Cotton wood grows on a higher level than willow and this is much higher land towards the levee. The general area where cotton wood grew, there wasn't very much indication of any appreciable amount of deposit in the last ten years, but where the willow was growing it was low.

Q. You didn't take into account the fact that possibly this timber might be subjected to fire in the ten year period?

A. We have very little fire in cottor wood areas. Cotton wood leaves don't burn very well.

Q. You did not take that into consideration?

A. No, sir, neither storms.

Q. Did you take into account the fact that the entire area might be destroyed by the fact that the river would change its course?

A. Not very much chance of that. You look at the map and see it is changing its course on the other side. Unless the United States Engineers, or somebody changed it——

Q. The river over-flows every year?

[fol. 213] A. Yes, sir.

Q. And it can change?

A. It constantly changes.
Q. You didn't take that fact into account?
A. I took into account the fact that the Mississippi River is constantly changing.
Q. It will not interfere with that area?
A. It cannot unless some man did something for it.
Q. I think the engineers would like to know that.
A. They know that.

Mr. Clarke:

That is all.

Redirect examination.

By Mr. Benton:

Q. Did you see any signs of over-flow of the Mississippi River at all in the area where this cotton wood was growing near the borrow pit?
A. It over-flows clear on the levee every year, or almost every year.

Mr Benton:

That is all.

The Court:

Next witness.

Mr. Jones:

If Your Honor please, by agreement between the parties we are amending both complaints in this lawsuit, that is to say, in the first suit No. 2304 and in No. 2536 we allege that the H. B. Blanks Construction Company was a contractor and demolished this timber.
[fol. 214] We want to amend that complaint by adding also the Pioneer Contracting Company. Both contractors damaged the tract involved in No. 2536.

The Court:

Which stretch was that?

Mr. Jones:

That is the Sharp tract, the Excelsior.

The Court:

All right.

Mr. Jones:

Then we want to make the same amendment in the other suit, No. 2804 involving Roseland to say both contractors did the damage on that tract for the reason that while the contractors had the different contracts, they interchanged work among themselves which took both contractors on to both the Roseland and also the Excelsior.

The Court:

All right.

Mr. Fleniken:

If Your Honor please, in connection with that, we would like to amend our answer to, of course, show everything we have denied in connection with that would apply not only to the Pioneer Contracting Company but also to the Blanks Construction Company and that would apply in both suits.

And you deny anything contained in the suggested amendment at this time?

[fol. 215] Mr. Fleniken:

That is correct, yes, sir, and wherever we have mentioned Pioneer Contracting Company we would also include the Blanks Construction Company.

Mr. Clarke:

The 3rd party defendant also requests the Court's permission to amend its answer in conformity with the government's answer to the plaintiff's suit.

In addition, I would add the word "oral"—before oral and written notice in Paragraph 6 of the first defense to plaintiff's petition. That is consented to and agreed to by counsel for defendant.

Mr. Jones:

That is correct.

Mr. Fleniken:

I don't know whether I mentioned the fact that I would like to have the Pioneer Contracting Company inserted in the answer in both suits and also the Blanks Construction Company in not only the answer but in the 3rd Party Complaint as well.

The Court:

All right.

Mr. Benton:

We now stipulate, if it is agreeable, that the area which is shown on the aerial photograph between the blue line nearest the Mississippi River and the Red line is the area which was cleared by the two contractors here involved in connection with these construction projects.

[fol. 216] The aerial map is marked "P-5".

Reference is being made, of course, to the work done by the two contracts under the agreements offered in evidence between the contractors and the United States Government.

With that, if Your Honor please, we close.

The Court:

Let us have your defense.

Mr. Fleniken:

If Your Honor please, the government moves for a directed verdict at this time and makes the oral motion and if you think it necessary we will prepare a written motion.

The Court:

I don't think you have to do that.

Mr. Fleniken:

I don't think so, where there is no jury.

The Court:

It will be denied at this time and we will proceed with the trial and I will hear you at the end of the trial.

Mr. Clarke:

The 3rd Party Defendant also moves the Court for a directed verdict.

The Court:

Same ruling.

[fol. 217] Mr. Fleniken:

If Your Honor please, the government would like to file in evidence document marked for identification "G-1" which is a resolution of the Board of Commissioners for the 5th Louisiana Levee District in which the Board of Commissioners resolved that they may enter into a contract with the government guaranteeing that they would carry out the provision of the Flood Control Act and specifically under Section 3 of the Flood Control Act of May 15th, 1928 that provides in part in Section "C" that they will provide without cost to the United States all rights-of-way for levee foundations and levees on the main stem of the Mississippi River.

Document identified as "G-2" which is a copy of the agreement under which the members of the Levee Board in the 5th Louisiana Levee District bind themselves to comply with the requirements under the Federal Flood Control Act and to furnish free of cost to the United States all rights-of-way for levee foundations and levees on the main stem of the Mississippi River.

As Exhibit "G-3" a letter from Mr. S. C. Smith, District Engineer, Department of Public Works, State of Louisiana, addressed to Mr. A. T. Shields, President, 5th Louisiana Levee District, in which he advises him of the receipt of a letter from Colonel John R. Hardin of the District Engineers, New Orleans, dated May 9th, together with the project plans proposed in the enlargement of the Brabston and Ashland Levees south of Vidalia, Louisiana and in which letter he recommends to the Board they follow the suggestions there and that that levee be enlarged.

[fol. 218] As Exhibit "G-4" a letter from Alvin R. Moore, Lieutenant Colonel, Corps of Engineers, Executive Officer of the Corps of Engineers, New Orleans District, addressed to the Board of Commissioners, 5th Louisiana Levee Dis-

trict, in which he enclosed the drawings for Item M-343-R, A-E, Brabston Levee enlargement and Item M-337-R, A-E, Ashland Levee enlargement, proposed for construction during the coming working season, and in which he also advises that this has been furnished to the Louisiana Department of Public Works and desiring that the District be furnished with a formal statement by the Board that the right-of-way is available for the construction of the enlargement and granting the United States a right-of-way in order that they might do this work.

As Exhibit "G-5" a letter from Mr. A. T. Shields, President of the Board of Commissioners, 5th Louisiana Levee District, addressed to Alvin R. Moore, Lieutenant Colonel, Corps of Engineers, Executive Officer, New Orleans, Louisiana, acknowledging receipt of his letter concerning the construction—the proposed enlargement of the Brabston and Ashland levees and advising that the rights-of-way——

The Court:

Mr. Fleniken, don't those letters contain the statements of what they are and why not number them as exhibits and offer them and then they will be in there to be read when the time comes.

Mr. Fleniken:

As Exhibit "G-6" which is a resolution of the Board of Commissioners for the 5th Louisiana Levee District. [fol. 219] "G-7" which is also a resolution of the Board of Commissioners for the 5th Louisiana Levee District.

And "G-8" dated July 15th, 1947 which is a letter from John R. Hardin, Colonel, Corps of Engineers, to the Board of Commissioners, 5th Louisiana Levee District.

"G-9" which is another letter from Colonel John R. Hardin, Corps of Engineers, to the Board of Commissioners, 5th Louisiana Levee District.

The Court:

If you have a number of those letters, the dates might be put in.

Mr. Fleniken:

This letter being dated October 7th, 1947 and a copy of a letter from Cornelia Kell, Secretary to the Board of Commissioner, 5th Louisiana Levee District, addressed to Honorable Howard P. Rabb, Assessor, Concordia Parish, dated June 20th, 1947 and marked "G-10".

Another letter marked "G-11" from Cornelia Kell, Secretary of the Levee Board, dated July 18th, 1947.

Another letter "G-12" from D. L. Nelson addressed to Miss Kell, Secretary, which letter is dated July 31st, 1947.

"G-13" which is a letter from A. T. Shields, President of the Levee Board, to D. L. Nelson, Spokane, Louisiana, dated August 4th, 1947.

[fol. 220] "G-14" a letter from A. T. Shields, President of the Levee Board to Mr. R. B. Sharp and Mr. R. M. Stricker, dated October 10th, 1947.

"G-15" a copy of a plat of Township 4 North, Range 9 East, North of Red River and also the certificate attached of Lucille Mae Grace, Registrar, State Land Office.

"G-16" which is a quadrangle identified as the Deer Park quadrangle showing the area here involved.

"G-17" which is a gauge report of mile 359.2 on the Mississippi River.

"G-18" which is a document showing the high water elevations at Fritz Island, which is the property involved in this suit.

"G-19" through "G-24" which are elevation charts of the land in the Ashland and Brabston levee area.

We would like to introduce on behalf of the government also the mosaic here which is the aerial photograph which has already been introduced as "P-5".

Mr. Clarke:

If Your Honor please, the 3rd Party Defendant makes the same offering of documents and exhibits as was made by the government and at the same time the 3rd Party Defendant asks the Court to take judicial cognizance of the confines of the jurisdiction of the 5th Louisiana Levee District as provided for in Louisiana Revised Statutes 1950, [fol. 221] 38951, which includes Concordia Parish, the situs of the property in question.

The Court:

The Court will take judicial notice of that.

(Whereupon the above described documents were marked "G-1" through "G-24" and filed in evidence on behalf of the government and the 3rd party defendant.)

D. L. Nelson, called as a witness on behalf of the government and the 3rd party defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Clarke:

Q. Please state your name and place of residence, sir?

A. David L. Nelson, Spokane, Louisiana.

Q. By whom are you employed, Mr. Nelson?

A. 5th Louisiana Levee District.

Q. How long have you been in the employ of the Levee District?

A. November of 1945.

Q. Do you have any particular functions or duties with the Levee Board?

A. Levee Inspector.

Q. Mr. Nelson, you are familiar with the entire Levee system within the 5th Louisiana Levee District?

A. I am.

Q. Are you familiar with an area commonly referred to as the Brabston Area?

[fol. 222] A. Yes, sir.

Q. Where is that located, Mr. Nelson?

A. Approximately twenty-three miles south of Vidalia.

Q. Do you remember of any levee work within recent years that was performed in that area known as the Brabston area?

A. Yes.

Q. Do you remember approximately what year that work was done?

A. Well, along in 1947.

Q. Do you remember any function that you performed in connection with that enlargement?

A. The only thing, I notified some of the land owners down there that it was to be started.

Q. How did you determine the names of the land owners in the area that would be affected by these two projects?

A. From the accessor's rolls.

Q. Did you personally examine the rolls?

A. Yes, sir, I went in to the assessor's office and asked the assessor to help look up the information.

Q. According to your examination, did you find any property listed in that area assessed to the General Box Company?

A. No, sir.

Q. Did you find any property in there assessed to Orrin James?

A. Yes, sir.

Q. Did you find any in there that was assessed to parties referred to as Sharp and Stricker?

A. Yes, sir,

Q. Did you give notice to these people as to the proposed work that was going to be conducted in that area?

A. I did.

[fol. 223] Mr. Benton:

I object on the ground the best evidence would be a copy of the notice he gave.

Mr. Clarke:

I haven't asked yet what type of notice he had given.

By Mr. Clarke:

Q. You did?

A. I did.

Q. In what manner did you notify these parties as to the proposed work to be done?

A. Verbal.

Mr. Benton:

Your Honor, I object on the ground that would not be a proper notice.

The Court:

Objection overruled. That goes to the effect and if it is not valid it means nothing.

By Mr. Clarke:

Q. Did you personally notify Mr. James this work was going to commence?

A. I did.

Q. Did you notify both Mr. Sharp and Mr. Stricker this work would be commenced?

A. No, sir, I notified Mr. Sharp.

Q. When was this notice given—these notices given?

A. That was along the summer, I think, of 1947, as well as I remember.

Q. Do you remember the time that the work did commence?

[fol. 224] A. In the latter part of the fall.

Q. Did you send the notices—would you say the notices were given before or after the work had commenced?

A. Before.

Mr. Clarke:

That is all.

Cross Examination.

By Mr. Benton:

Q. Did you examine the assessment records personally, or did you just simply take the statement or certificate of the assessor?

A. Went in and looked over the assessment books.

Q. You examined the assessment records yourself?

A. Yes, sir.

Q. Did you examine the conveyance records of the Parish?

A. No, sir.

Q. Do you follow the practice of relying exclusively on the assessment rolls of the parish to determine what notices should be sent and to whom those notices should be sent? Is that the only source of information on which you rely in determining what notices should be sent?

A. I go into the Assessor's office and ask about certain pieces of property involved and we look it up on the assessment book.

Q. Is it the custom of the Levee District for whom you work to give verbal notices? Is that the method of notification?

[fol. 225] A. No, sir. That is not the only way. They are usually notified by letter. In this case they only notified the ones I saw down there.

Q. Did they send any written notices in this case to anybody?

A. I think they are of record. I think they have notice of that.

Q. Do you know of your own knowledge whether they gave any written notices in this case?

A. I do not.

Q. Was it your responsibility to give these notices? Was that a part of your duty?

A. Not to give them in writing. I was instructed to notify those people down there.

Q. Were you instructed to give them an oral notice or written notice?

A. Oral notice.

Q. Is that the only kind of notice you ever give personally, an oral notice?

A. Yes, sir.

Q. Do you know of your own knowledge whether a written notice of any kind was given in this case?

A. I do not.

Q. How is that, sir?

A. No.

Q. You didn't make any record of the day or date when you gave this notice?

A. No, sir.

Q. And I suppose this was one among a number of notices you gave in connection with this project?

A. There were only three of them I gave notice to down there, Mr. James and Mr. Sharp and Mr. James Jones.

Q. Were only three people involved?

A. That is the only ones I saw down there.

[fol. 226] Q. Do you know when this work started?

A. It started the latter part of 1947.

Q. What part of 1947? What month in 1947?

A. I don't remember offhand. It was after July, I think.

Q. You say "after July"?

A. In July. Somewhere along in there—the summer.

Q. Do you remember the date when you gave the notice?

A. No, sir.

Q. Have you any rough idea as to when you gave the notice?

A. After the contract was let.

Q. How long after it was let?

A. Probably after the Board gave the right-of-way.

Q. "Probably", you say?

A. When they gave the right-of-way.

Q. How long after they gave the right-of-way?

A. Well, I couldn't say.

Q. Did you know about the notice that was given to Mr. A. T. Shields, the President of the Levee Board, to Mr. Sharp and Mr. Stricker and to Sharp and Stricker of date October 10th, 1947 which is offered in evidence as "G-14"?

A. No, sir.

Q. How long was that written notice given after that work actually started?

A. That I can't say.

Q. If the work started in July, it was giving at least two or three months after the work was started; is that correct?

A. Well, I couldn't say because I think you will find in the record what time it started.

[fol. 227] Q. Don't you make it a practice in connection with notices of this kind to make a notation of the date when the notice is given?

A. No, sir.

Q. Would you say this written notice was given after that work started, dated October 10th, 1947?

A. I would think so.

Q. Did you know the owners of the General Box Company?

A. No, sir.

Q. You knew of the General Box Company, didn't you?

A. Yes, sir.

Q. Didn't you know, as a matter of fact, they owned the timber on this land, or on a part of the land?

A. No. I knew the General Box Company was on the

Roseland property. They were logging there one time and then they sold the property to Orrin James. I knew that.

Q. When did you know about the logging operations they carried on on the Roseland tract?

A. That was in the fall or spring of 1946, I believe.

Q. That was a year before?

A. Yes, sir.

Q. How did you know about the operations they were carrying on on the Roseland tract?

A. They were hauling across the levee.

Q. They had to get consent to do that?

A. Yes.

Q. From you?

A. Our office, yes, sir. They got it from the Levee Board and I had to approve it.

Q. A year before you didn't now they were carrying on operations on the Roseland plantation?

[fol. 228] A. Yes.

Q. Did you make any effort to contact anybody connected with the General Box Company, or to ascertain from any other source if they still owned any interest in the timber in that vicinity?

A. No, sir.

Q. Did you make any inquiry about that at all?

A. No, sir.

Q. Do the records up there in Concordia Parish reflect separate assessments for the timber?

A. Well, I saw no timber assessed at the time.

Q. Do they ordinarily reflect separate assessments for the timber?

A. Well, I don't-now. I can't say. I am not that familiar with the records.

Q. Haven't you had occasion in your general transaction of business for the Levee Board to find instances where the timber was separately assessed from the land?

A. I never noticed it.

Q. You don't know, as a matter of law, timber is separately assessed from the land under the Louisiana Law? You don't know that?

A. No. I did not know title had been separated. I was only looking for the land owner.

Mr. Benton:

That is all.

The Court:

Next witness.

Mr. Jones:

I would like to ask the witness a question.

[fol. 229] The Court:

All right.

By Mr. Jones:

Q. Did you ever have a conversation with Mr. Mullins, the Logging Superintendent of the General Box Company?

A. I did at one time where he was talking about selling the property to Orrin James.

Q. Did he at that time state he was reserving the timber for the General Box Company?

A. No, we didn't go into that at all.

Mr. Jones:

That is all.

The Court:

Next witness.

JOHN R. CURREY, called as a witness on behalf of the government and 3rd party defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Fleniken:

Q. You are Mr. John R. Currey?

A. Yes.

Q. Where do you live, Mr. Currey?

A. I live in Vicksburg, Mississippi.

Q. By whom are you employed?

A. The Corps of Engineers, Vicksburg District.

Q. How long have you been employed by the Corps of Engineers?

[fol. 230] A. I started to work there in October 1929. My service was broken by active duty in the military service.

Q. You have been with them continuously since that time, since you returned from service?

A. I was with them continuously until I went in the service and after I came back I have been with them continuously since.

Q. In what capacity are you serving with the engineers?

A. I am Chief of the Topographic Section with the Engineers.

Q. Are you an engineer by profession?

A. I am a graduate engineer, a civil engineer, from Mississippi State College.

Q. How long have you been in charge of the topographic Section of the Corps of Engineers?

A. I became Chief of the section in the spring of 1946. Prior to that time I was Assistant.

Q. Mr. Currey, I hand you here this document which has been filed in evidence as "P-5" and also "G-25" which is an aerial photograph of the area involved in this lawsuit and I ask you, Mr. Currey, if you had anything to do with the preparation of this?

A. It was prepared under my supervision.

Q. Tell the Court how it was prepared, Mr. Currey, please?

A. In November 1945 the Corps of Engineers contracted aerial photographs to be flown along the Mississippi River. These were flown by 16th Photographic Squadron of the United States Air Force. They were flown with a six inch lens camera at an approximate altitude of ten thousand three hundred feet.

Q. Then you have had it enlarged, Mr. Currey?

[fol. 231] A. It has been enlarged approximately twice its size.

Q. Have you super-imposed other markings on the photograph?

A. On this photograph we have super-imposed the land lines as described in the deeds of the Roseland Plantation and the Excelsior and Home Plantation.

Q. Those are the two tracts of land involved in these lawsuits?

A. That is my information.

Q. In connection with those two plantations, what have you shown on this aerial photograph, Mr. Currey?

A. We have shown the location of the boundaries of the two plantations as described in the deed and as taken from the General Land Office plat of 1828-29.

Q. You have shown on there also the levee and the borrow pits in connection with it?

A. These photographs were flown—they are the latest photographs we have prior to the time work was started on the levee and from these I have surcharged the borrow area that existed prior to the beginning of any work on the new enlargement. The nearest photographs we have after the work was completed are photographs that were flown in December 1949 and they were flown by the General Aerial Surveys with a focal lens of eight and a fourth at an altitude of thirteen thousand seven hundred and fifty feet. These are photographs—they have the limits of the change from the 1945 to the 1949 which I have surcharged on this original mosaic. The yellow line representing the outside limits of the borrow pit area as shown on the 1949 photographs and the red line repre-[fol. 232] senting the outside limits of the cleared area that was cleared for the construction of the levee as shown on the 1949 photographs. There is breaks between the red lines and the blue lines which indicate cleared areas or open fields where there was no woods.

Q. That was taken from the original photograph in 1945; is that correct?

A. We have a projector on which we can put a photograph and reflect direct to this mosaic. We put our 1949 photograph into the photo-enlarger and projected it onto the 1945 mosaic and then we drew the new woods line onto the 1945 mosaic which represents the red line shown on the map on the mosaic.

The Court:

Does that represent the outside width of the levee from the river including the borrow pits?

The Witness:

It represents the edge of the present or the 1949 timber line. The timber line—the red line is the limit of the present timber and present cleared borrow pit area.

The Court:

That is the line where the borrow pit stops and the timber begins, including the outside bank of the borrow pit?

The Witness:

Not exactly the borrow pit—the yellow line represents where the borrow pit stops.

[fol. 233] By Mr. Fleniken:

Q. That was the original borrow pit?

A. No, the present borrow pit, but there is an area between the outside limits of the present borrow pit and the beginning of the woods which represents just a cleared area.

The Court:

Cleared by you in the construction of the levee, or already cleared?

The Witness:

Cleared during the construction of the levee.

The Court:

That is the area involved in taking some of the timber?

The Witness:

Yes, sir.

The Court:

Go-ahead.

By Mr. Fleniken:

Q. In other words, the entire area from the levee back to the red line is where it shows timber was taken from?

A. I would say the rear between the outside limit of the

borrow pit before the levee was started to the red line represents an area in which timber was destroyed or removed during the construction of the enlargement.

Q. You say in connection with the red line where there are breaks, that is an indication there was no timber in [fol. 234] that area, where the red line does not extend on through?

A. That is correct.

The Court:

Before the levee was constructed. There was none there when you constructed the levee and, therefore, no timber taken off?

The Witness:

No timber shows on the mosaic with the exception there might be several scattered trees in an open field. Our classification is "open field." If there is two or three scattered trees, or if there is bushes you can't see on a photograph—they may be knee high, or waist high, it would be classified as open field.

The Court:

That wouldn't mean anything. It is the merchantable timber involved.

By Mr. Fleniken:

Q. Mr. Currey, I notice other markings here beginning at the top right-hand part of the photograph which would be the east side of the photograph and continuing on around. What do those indicate?

A. On our standard hydrographic survey of the Mississippi River we carry a station number down the Mississippi River levee. This represents an old station number and they have a new station number and the equations at certain points. Where the old station comes in, there may have been a setback or there may have been enlargements which would change the original station number. Those numbers represent the station number of the levee [fol. 235] station. Where there is an equation, I have shown an equation.

The Court:

What do you mean by an equation?

The Witness:

I mean if they built the levee set-back—somewhere above here when they built around this change, it changed the continuous levee station from the source, so they already had an old station number but when it went around this way (indicating), then they have an equation.

The Court:

What do you mean? Figuring out the distance?

The Witness:

That is right, the length in thousands of feet.

By Mr. Fleniken:

Q. In your contracts, you let them according to your stations, Mr. Currey?

A. The contract specification are let by station. If there are equations in the area, the contract equation would show on any specifications.

Q. Mr. Currey, in connection with this photograph, have you computed in any manner the area in each of these two projects, the Roseland plantation and the Excelsior and Home Place plantation?

A. Yes, sir, I have.

Q. How did you do that?

The Court:

You mean, Mr. Fleniken, the area in the taken land?

[fol. 236] Mr. Fleniken:

First the total area, Judge.

The Court:

The total area, but you asked for two projects. You mean the land taken for the levee purposes in those two projects?

Mr. Fleniken:

He has computed the entire area for each plantation and then he has included the part taken.

The Court:

We don't care about the area of the plantation.

The Witness:

My computations for area was done by means of a planimeter, which is an instrument engineers use to compute irregular areas—areas that are too irregular to survey in the field and it is an accepted means of determining irregular areas.

In the Roseland plantation, which comprises Sections 5, 6, 7, 8, 9, 26, 27, 29, S½ of Section 30 and 42 and ac-retions to Sections 8 and 9. There are no pieces of the frontal sections that haven't been washed away. The acreage in that area is 2670.85 acres.

The Court:

What particular area are you talking about?

The Witness:

That is the area of the sections I named in the Roseland plantation.

[fol. 237] The Court:

That is the combined Roseland plantation alone?

The Witness:

That is correct.

The 1949 acreage to the 1828 plus 1829 top bank line is 2421 acres. The 1949 acreage to the 1949 top bank which includes ac-retions to Sections 8 and 9 was 2455 acres. The ac-retions of that was 34 acres, which gives us a total of 2455 acres. That is the total acreage in Roseland.

I have broken that down to 52 acres of levee, 47 acres of borrow pits, 311 acres of clear land, 234 acres of abandoned fields and 1811 acres in woods.

By Mr. Fleniken:

Q. You have computed the area taken in the enlargement of the levee here involved in this suit?

A. The additional borrow area from the blue to the yellow—that is where the dirt was—was 67 acres. The area where the woods was destroyed is 95 acres.

Q. That is the total amount of acres on the Roseland plantation where the timber was destroyed in the enlargement of this levee?

A. That is correct.

Q. What did you find with reference to the Excelsior and Home Place plantation, Mr. Currey?

A. Excelsior and Home Place plantation, there was 164 acres in which the woods were destroyed.

Q. Now, Mr. Currey, all of this timber that was taken and this property from which it was taken, was that land that had been built up there by the river?

[fol. 238] A. All I can say is that the General Land Office plat, when the survey was made in 1828-29, I have shown that line on here.

Q. You have shown the river bank?

A. As it existed in 1828-29. That is the meander line right here. (indicating)

Q. What about the meander line on the Roseland plantation in 1828 and 1829?

A. It runs out to the river. The river was cutting off the line except for this little corner (indicating).

By Mr. Clarke:

Q. Otherwise, this is more or less a continuous circle?

A. That is correct. The ar-a on the outside of that—it is there now and how it got there I will assume the river changed its course sufficient to put it there.

By Mr. Fleniken:

Q. Mr. Currey, have you computed the percentage of the area taken in the enlargement of the levee to that of the land from the river to the levee?

A. I have. In the Roseland plantation there was 1811 acres of woods—total area in woods and 95 acres was destroyed. The ratio of 95 into 1811 was 5.24 percent.

With reference to the Excelsior and Home Place plantations, the total acreage inside—the wooded area inside the levee was 161 acres and the wooded area outside the levee was 1826 acres, which gives me a total wooded area of 1987 acres and 164 acres were destroyed which gives a percentage of 8.25 percent.

Q. Mr. Currey, have you estimated the distance from the river to the levee area here?

[fol. 239] A. I haven't estimated it but it could be scaled on here (indicating). I could calculate it.

The Court:

Just approximate it. That is not important.

The Witness:

It is approximately 3500 feet. It varies from 4500 to 3300.

By Mr. Fleniken:

Q. Mr. Currey, I hand you a document here which has been filed in evidence and identified as "G-17" which is the Mississippi River gauge at Natchez, Mississippi at Mile 359.2, and I will ask you to explain that to the Court, please?

A. The gauge reading of high waters at the Vicksburg gauge—this is a tabulation from the Mississippi River at Natchez, Mississippi. It is 359.2 miles above the head of the passage.

Q. Is that at Natchez or Vicksburg?

A. This is Natchez.

The Court:

You said Vicksburg.

The Witness:

That was not right. Vicksburg is not right.

The Court:

You meant to say Natchez?

The Witness:

Yes, sir.

[fol. 240] By Mr. Fleniken:

Q. You are located at Vicksburg, are you not, Mr. Currey?

A. That is correct. I went by the hydraulic section and asked them to give me the official records of the gauge stages of the Natchez gauge and they have given me the stages from 1911 to 1950.

Q. I hand you a document which has been filed in evidence and marked for identification "G-18" and ask you whether you had anything to do with computing those figures and what they are?

A. The Mississippi River Commission maintains high water gauges along the Mississippi River. There is a gauge at lower Glasscock. There is also a gauge 54 which is near the south boundary of the Roseland plantation. There is a gauge 53 which is below the lower limit of the Excelsior and Home Place plantation. There is also a gauge just south of the work gauge "G-14". These were the nearest gauges to the project. The elevation on these gauges is not read regularly. It is merely read at high waters and not all high waters, but they have tabulated the gauge readings that were available from 1927 to 1950 and this tabulation is the gauge readings which represents mean sea level at these points on these years for the high water elevations.

Q. What is the average high water level, Mr. Currey, at those different locations?

A. The three gauges varied—or the four gauges. They don't all read exactly the same. There is a difference. So, we have averaged the readings of the 54 gauge to the reading of the G14 gauge and obtained an average high water elevation in the vicinity of the property involved and we have averaged the 17 available readings in that area from [fol. 241] the period 1928 to 1950. We left out 1927 and this average is 58.1.

The Court:

Did you take the readings on the same day each time?

The Witness:

No, sir, the readings are taken at the maximum high water.

The Court:

And that is recorded, of course, on any gauge that is there?

The Witness:

That is read off of the existing gauges that are there.

By Mr. Fleniken:

Q. In connection with that, Mr. Currey, have you made any capitulation with reference to the elevation of the land involved in this suit?

A. There is available the facts for Ashland levee enlargement and Brabston levee enlargement.

Q. And those I hand you are marked for identification "G-19", "G-20", "G-21", "G-22", "G-23", and "G-24".

The Court:

They mentioned them by projects in other areas aside from where the property was?

[fol. 242] The Witness:

The Roseland plantation falls within Items D and E of the Brabston Levee enlargement.

The Court:

All right.

The Witness:

The Excelsior and Home Place plantation fall in the limits of Item E Brabston enlargement and Items A, B and C Ashland levee enlargement.

In the preparation of the specifications for the work, plan maps are prepared and on these plan maps borings are made to determine soil classification. These borings are spotted on the plan maps and numbered. They are also numbered on sheet 3 of the specifications and this further shows the elevation of the ground surface where each boring was made.

By Mr. Fleniken:

Q. Does that cover the entire Ashland project, Mr. Currey?

A. This covers the entire Brabston project and the entire Ashland project.

The Court:

Anything on there to show which, if any, of those borings and elevations were taken on the properties involved here?

The Witness:

Yes, sir. At station 6792 plus zero, zero, we have a number 46 and a number 47 in the close proximity.

[fol. 243] The Court:

Of what?

The Witness:

Of Station 6792 plus zero, zero, which is the dividing line between Items B and Item C of the Ashland levee enlargement.

The Court:

That includes some of this property in controversy?

The Witness:

It includes a part of the Excelsior and Home Place plantation. This boring 46 and 47 will be located on here and elevations read.

The Court:

Gentlemen, is it worth while to have all that detail about the borings and several elevations?

Why not have the witness give you the approximate elevation of the properties involved here. Neither the appellate Court nor I are going to be particularly concerned in the elevations and borings all up and down that river and if he has computed it sufficient to be able to state reasonably the elevation of these properties, I think that is all you need, and you got the other data with respect to the height of the river, and things of that kind.

By Mr. Fleniken:

Q. Mr. Currey, have you made such a computation?

A. My work has been strictly on the maps and these other computations—I haven't made any such computations.

[fol. 244] The Court:

Can't you give, from what you have done there, the approximate elevations of these properties?

The Witness:

I could say 50 to 55—just looking across the map indicates an average evolutions.

The Court:

Is that much of a variance?

The Witness:

Yes, sir.

Mr. Fleniken:

If Your Honor please, we can discontinue this testimony. We have another witness who has most of this available.

The Court:

I don't see any sense in putting all that detail in, since all we are concerned with is the elevation of the land as compared with the high water.

Mr. Fleniken:

We tender the witness.

Cross-examination.

By Mr. Benton:

Q. Mr. Currey, all the testimony that you have given here about this aerial mosaic which was offered in evidence is based, as I understand it, on calculations that you made by the use of aerial photographs alone; isn't that correct?

[fol. 245] It doesn't involve any surveys on the ground?

A. No, I wouldn't say that because we have distances and station numbers.

The Court:

Your stations are definitely settled by engineering methods?

The Witness:

That is correct.

By Mr. Benton:

Q. Apart from the fact of the establisment of the stations, in fixing these lines, the two blue lines which mark the limits of the old borrow pit and the red line which marks the outer limits of the area of land cleared in connection with the construction and the yellow line which marks the present location of the new borrow pits; is that based on actual engineering surveys or a comparison of aerial surveys?

A. No, that is based on comparison of aerial photographs. The mosaic itself represents the condition as it was in 1945 when the photographs were flown.

Q. One point I am principally interested in, Mr. Currey—in following that red line on the map, there are certain breaks at different points where you say that there was no timber at all; is that correct?

A. I show a yellow line which represents the area that was used in building the borrow pit, but there is no timber behind that yellow line, therefore, I don't show any timber. The red only goes around the timber that existed.

Q. Wherever the red line is, there was timber in that area?

[fol. 246] A. Yes, sir.

Q. And if there is a break in the red line, there was no timber at that point?

A. That is correct. I have shown in my tabulation the area with and without timber.

Q. And your conclusion that there was no timber in these areas where the red line is omitted was based on the evidence that you could do so from the aerial photographs alone; is that correct?

A. They were the evidence that I could rely on from the 1949 photographs. The red woods was taken off the 1949

photographs. I have a set of 1949 photographs which shows that there is still no woods there in 1949 when these were flown.

Q. Actually, this map which was made originally in the fall of 1945, November 1945, doesn't that map reflect from the aerial photograph itself the same situation about the presence or absence of timber throughout this area?

A. That is correct. It is the photograph of the area.

Q. As shown on the map in this present form. You haven't projected anything on the map of 1945 from the aerial map of 1949 which has the effect of changing the physical facts as to the presence or absence of timber, have you?

A. In the 1945 photographs, they repres-nt the condition of the land prior to the construction or to the initiation of any work on the Roseland and Excelsior projects.

Q. That is the same on this map as it was?

A. It stands like it was but the woods on there has been taken off of the December 1949 photographs and the woods line in red I shown on there comes from the 1949 photographs which is after the completion of all the work on the [fol. 247] Roseland and on the Excelsior projects.

Q. I must frankly confess—I may be dumb——

The Court:

Let me tell you what I think he is talking about.

As I appreciate what he is saying, that 1945 map showed the timberless area.

That is what you meant to say?

The Witness:

Yes, sir.

The Court:

And in 1949 he has shown a line there where the timber is now, or was, in 1949 after the levees had been built.

Is that what you are trying to say?

The Witness:

Yes, sir.

By Mr. Benton:

Q. Do you mean you projected the red line from the 1945 map?

A. I still don't show any timber in this area in there. There is still no timber there in 1949.

Q. And you are still using the 1949 map for that purpose?

A. I don't want to show you this because that has been destroyed. I want to show you what was there before we [fol. 248] did any work and then show you what was there after the work was completed.

Q. In making these calculations from aerial photographs do you have any trouble in diagnosing when you rely on a photograph taken by a method of this sort at an elevation of twenty thousand feet—like shadows?

A. I would say depending on the angle of the sun you are going to have shadows and if you have ever seen a photograph of a bridge across the river, you don't know which is the bridge and which is the shadow.

Q. If the evidence is based exclusively on an aerial photograph, doesn't that mean the possibility of the extent of cleared areas——

Mr. Clarke:

We have already stipulated. It is a plaintiff's exhibit that was offered in evidence by themselves and there is no reason why now he should be attacking it.

The Court:

I think he has got you there.

Mr. Benton:

As a matter of fact, I am not seriously contesting the authenticity of the map. I am trying to get at the prolific source of informa-ion on which the United States engineers rely in reference to data of this sort.

The Court:

I think principally what the defendant's counsel is trying to do is cut down the area—I mean cutting down the area of timber. As I understand it, it is a real dispute between

[fol. 249] the plaintiff and defendant on the area of timber destroyed.

The Witness:

I have only put on there the data that comes from the 1949 photograph. The timber line shown on the 1949 photograph is the red line on the 1945 photograph.

The Court:

I got the impression that some of your testimony was to sustain the proposition I asked Mr. Fleniken about originally.

Was there a difference between the area of timber?

Mr. Clarke:

Yes, sir.

By Mr. Benton:

Q. If I understand your testimony correctly, you mention two gauges, one for the purpose of designation on the upstream side of the river and one on the downstream side of this property?

A. There are five gauges shown in the exhibit. Some of those gauges existed prior to the construction of the levee and were possibly destroyed. Others were established, but all the gauges—four gauges were in the immediate vicinity of the Excelsior and Home Place and the Roseland plantations. We have also shown there the stage readings of the Natchez gauge, the Natchez gauge being the nearest gauge where all the readings existed for the high waters for every year.

[fol. 250] Q. Insofar as the Natchez gauge was concerned, you show the high water from year to year beginning in 1911?

A. That is correct.

Q. Just averaged out what the high average mean level was of the Mississippi River as determined by the Natchez gauge?

A. The Natchez gauge represents the stage reading. The zero of the gauge, if you look at the top, I think it is 17.28 feet. That is mean sea level and you add to the stage

reading on the gauge and it gives you mean sea level. You also have a reading taken the same day and same time down at the Excelsior tract and at the Roseland Plantation and from that we determine the fall of the river between those two stations, so you can compute, if necessary, the high water that existed in the years in which we don't have any high waters.

Q. From a layman's standpoint who doesn't understand all the technicalities, can you take all the data up here involving the Natchez gauge and can you from the year 1911 down to the year 1950 figure what the average high mean level was at Natchez?

A. At Natchez or at the Roseland plantation?

Q. At Natchez?

A. Yes, sir.

Q. What is the high average mean level of the Mississippi River over that period of time at Natchez?

A. I will have to add this zero of the gauge to the stage reading.

Q. You haven't made that calculation?

A. I haven't made that calculation.

Q. But you have made, as I understand it, over a seventeen year period beginning in 1928 and coming down to 1950, you have made that calculation?

[fol. 251] The Court:

That would be twenty-two years.

The Witness:

There are certain years in there the gauge was not read

The Court:

For seventeen years it was read?

Mr. Benton:

Yes, sir.

By Mr. Benton:

Q. You have made a calculation of the average high mean level of the Mississippi River taking into account the average information you obtained from five different gauges?

A. Those five gauges were not all read the same year. We might have averaged two of them, or we might have only one reading.

Q. You have averaged at an average high mean level of 58.1?

A. That is correct.

Q. And that takes into account information you received from five separate gauges?

A. That is correct.

Q. Over a period which involved actual readings for seventeen years, dur-ng the period 1928 to 1950?

A. That is correct.

Q. Does this calculation include the gauge readings at Natchez?

A. This does not. When we say "five gauges" we include the Natchez gauge but the calculations only include the four gauges. I used the Natchez gauge and took the [fol. 252] fall of the river and averaged some gauges to fit in but I didn't use any average gauges in my calculations. That only represents the average readings of the four gauges, not the five.

Q. It does not include Natchez at all?

A. That is right.

Q. Two of these gauges are located on the upper part of the river and two below?

A. The lower Glasscock gauge is below and to the right.

Q. How far below and to the right?

A. I can scale it but I wouldn't estimate a guess.

Q. Scale it, please, sir.

A. Lower Glasscock gauge is midway between the Roseland plantation and the Excelsior and Home Place plantation on the opposite side of the river.

Q. It is right opposite the two properties involved?

A. That is correct.

Q. Where are the other three?

A. Gauge 54 is at the lower end of the Roseland plantation on the river side of the levee.

Q. At the lower end of the Roseland plantation?

A. At the lower boundary where the south boundary of the Roseland plantation crosses the Mississippi River levee on the river side.

Q. How many readings were taken from the latter gauge during that period of time 1928 to 1950?

A. They are recorded on the sheet. From gauge 54 we have a 1927 elevation, a 1928 elevation, a 1932 elevation and a 1935 elevation; only four.

Q. Four readings?

A. Yes, sir.

Q. And the first gauge you mentioned which you placed at a point almost at the boundary between the Roseland [fol. 253] plantation and the lower Glasscock gauge you mentioned, which is right opposite the two pieces of property involved; how many readings were made from that gauge over this period of time?

A. The lower Glasscock reading was made in 1937, 1938, 1939, 1940 and continuously each year until 1946, inclusive. There was no reading made in 1947. The reading was made in 1948 and a reading was made in 1950.

Q. Where are the other two gauges you are relying on?

A. Guage G-14 is south of Section 15, Excelsior and Home Place plantation, on the opposite side of the river.

Q. How many readings were taken from that gauge during that period of time?

A. From Gauge G-14, a reading was made in 1937, 1938, 1939, 1940, through 1946. There was no reading made in 1947. A reading was made in 1948 and a reading was made in 1950.

Q. Where is the fourth gauge?

A. The fourth gauge is about a mile and a half west of the lower limits of the Excelsior and Home Place plantation on the same side of the river.

Q. How many readings are reflected in reference to that, on your statement?

A. G-53, there was a reading made in 1927, 1928, 1929, 1932, 1935, and that was all.

Q. Now, as to the borings that you referred to, were those borings made by the United States Army Engineers?

A. They were made by the boring section—I might say that I am not positive who made these borings. They were done when the New Orleans District had charge of the work and I am in the Vicksburg District and I [fol. 254] wouldn't be able to testify as to who made the borings.

Q. Isn't it a fact, Mr. Currey, in the data which you had here a little while ago which had to do with these borings, it is reflected only two borings were made that have anything whatever to do with these two particular properties?

A. No, sir, there were many borings made. The borings are very thickly spotted all through the borrow area to be used to determine soil classifications on which to construct a levee.

Q. What do those represent?

A. They represent the top of the ground and each elevation down is the type of soil reflected.

Q. What level is that above sea level?

A. That is mean sea level.

Q. What would be the relation between mean sea level and the average mean high level of the Mississippi River? Would that be the same thing?

A. Mean sea level represents an elevation above the level of the sea. Of course, there might b- a gauge reading. You might read a gauge at Natchez but you would have to remember zero of the gauge. The zero of the gauge might be ten feet above the ground. At Natchez it is 17.

Q. In the case of Natchez, then you would take the readings of the Natchez gauge that would enable you to determine the average high mean level of the Mississippi River and then in order to reduce that to sea level you would add 17?

A. As shown on the sheet, which is 17.28 feet.

Q. Since you are coming back tomorrow, would there be any difficulty in your taking the information you have about the Natchez gauge to make a computation that [fol. 255] would reveal the average high mean level at Natchez?

A. It could be done.

Q. It could?

A. The average high water would be expressed at mean sea level elevation. I could express it at a gauge level or a mean sea level elevation but I would like to express it in mean sea level elevation.

Q. I- this case it would enable you to show the significance shown by the borings?

A. It would also be approximately the same as the

elevations shown on the quadrangle map and also similar to the elevations shown on the plain map.

Q. You have studied the over-all project. Can't you now, since you have testified that a great number of borings were made in this area involving these two properties which reveal the elevation of the ground where these borings were made where this construction was to be done?

Since you are familiar with the gauge readings and you are familiar with the gauge readings at Natchez, Mississippi, taking into account the distinction between the sea level you mentioned and the average high mean level of the Mississippi River, ar- you in a position to say it is not evident this property at the point of construction was above or below the average high level of the Mississippi River?

A. I would like to say my specialty is making maps and this information that I have on the gauges is official records that have been given me officially from the Vicksburg District and the maps are official, but I am not the person to make that computation because it can be done by the person who was present and recorded and checked the specifications and from official records of the specific map.

[fol. 256] The Court:

Is there any question that this property involved here and on which the timber grew was subject to private ownership?

Mr. Benton:

Yes, sir, we contend it was not batture.

Mr. Clarke:

And we contend it was batture.

Mr. Benton:

Our case is not wholly predicated on the idea this is not batture because we are relying on the doctrine of the Tilton case. The proper application of the Flood Control Act and, in fact, the rights exercised were in destroying this timber, which doesn't have anything to do with it.

We have a perfectly good claim even though this property may be declared as batture. The main defense of the Levee Board is it was batture and it would restrict our right of recovery to the existing value of the property. Another point we are making is that it is above the average high water level of the river.

The Court:

I think that is very material. Some other witness may be able to swear that property is above the high water mark. I think we should discontinue with this witness now.

[fol 257] Don D. Farmer, called as a witness on behalf of the government and 3rd party defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Clarke:

Q. State your name, please?
A. Don D. Farmer.
Q. Where do you live, Mr. Farmer?
A. Lake St. John, Concordia Parish.
Q. What is the nature of your business?
A. Levee Contractor.
Q. Are you owner of the business?
A. I am a partner in the business.
Q. What is the name of your company?
A. The H. B. Blanks Construction Company.
Q. Mr. Farmer, you are familiar with the area in Concordia Parish known as the Brabston area?
A. I am.
Q. Has your company ever done work in that area?
A. We did quite a bit in 1947 and 1948.
Q. Do you remember the contract number designation of the work you performed?
A. Our company did Branston A, B. C, and Pioneer did Brabston D and E.
Q. Did you actually perform the construction work on

the levees in accordance with the contract with reference to the portion of the work that you bid on?

A. We did not. We subcontracted some work on Brabston to the Pioneer Construction Company and they, in turn, subcontracted some work to Ashland from us.

Q. Do you remember how you finally ended up carrying out the construction of the Brabston Levee and that is [fol. 258] with reference to Contract number such and such?

A. Well, we did all of Brabston A, B and C. We did a small portion of the lower end of D and all of E on Brabston.

Q. In connection with this work, we will refer to it as the Brabston enlargement of the Excelsior and Home Place——

A. You call it the Home Place. We call it Fairview.

Q. Do you remember the distance in yards of the work that you actually performed on this enlargement?

The Court:

On Brabston?

Mr. Clarke:

Yes.

The Witness:

I don't remember the distance in yards.

By Mr. Clarke:

Q. Did you also do the clearing work in connection with this enlargement on the portion of the levee that you finally built?

A. We did.

Q. Do you know Mr. Mullins, the witness that was here today?

A. Yes, sir.

Q. Did you have occasion to see him during the year 1947 while you were engaged in the construction of the Brabston Levee Enlargement?

A. Not Brabston, Ashland.

Q. Ashland?

[fol. 259] A. Yes, sir.

Q. What reason did you have to meet with him?

A. We were clearing there with bull-dozers and tree-dozers on Ashland A.

Q. Can you state how far you had progressed with your work at the time that you met with Mr. Mullins?

A. Clearing work?

Q. Yes.

A. We started here (indicating) and progressed in this neighborhood.

The Court:

You have to put something there. That doesn't mean a thing.

By Mr. Clarke:

Q. You commenced at the line labeled "boundary" by mutual agreement immediately north of Section 12, Township 4 North, Range 9 East?

A. That is about right.

Q. And you proceeded with your clearing then southward to about——

A. About Levee Station 6635 which was on Item A, Ashland.

Q. That was about where you had progressed to in your clearing at the time Mr. Mullins approached you on the job?

A. That is right.

Q. What reason did he give for coming down to see you?

A. Well, he did not come down at first. The woods foreman came down with a crew of men and started cutting timber in our right-of-way. I went down to see who they were and they said they were from the General Box Com-[fol. 260] pany and sent down by Mr. Mullins. I told them they were interfering with our method of clearing. We were pushing the trees up and out and I was going to move bull-dozers in ahead of them to push the trees down like we had been doing. They quit that day but they said they were going to get Mr. Mullins and he came down the next day and he wanted to cut the trees and I wanted to push them down and we finally had to agree on something and we agreed I would clean around the trees he said he could

use and leave those trees stand and he would come in and cut them and drag the logs he wanted in open spaces and I would come back and push the stumps and the tops out.

The Court:

That was after you had pushed them down?

The Witness:

Yes, sir, after I pushed the trees down.

By Mr. Clarke:

Q. What was the requirements with reference to this clearing insofar as the number of trees and the proposal, that is, whether you would cut these trees down or your could use your own method?

A. We can clear it anyway we see fit.

Q. Was any timber salvaged in this area where you first commenced until the General Box Company people made their first appearance?

A. I didn't see them get any trees out of there.

Q. Did you get any reaction from Mr. Mullins as to your clearing of the right-of-way from the time you first talked to him until you completed your portion of the job?

[fol. 261] A. No.

Q. Did you ever discuss the matter with him at any time?

A. Well, I did see him every few days and talk about it.

Q. Did he make any complaints to you about the destruction of the timber?

A. I don't remember him complaining, but where this A-Frame hit the tree, it was breaking the bark and they were getting some damage there.

Q. Did he ever complain to you a great portion of that timber was being destroyed?

A. No, he didn't.

Q. Did you have any conversation with anyone else employed by the General Box Company with reference to this clearing project?

A. I did not.

Q. With reference to the clearing of the timber in the manner in which you finally did and not the method by which he wanted you to permit him to clear it, would that have

meant anything to you, or to your company, in the way of extra expense?

A. We were making one extra move. After we cleared out around them and we pushed the tree down and they came and cut the log length out, then we came back and pushed the stump out.

Q. Did that cost you any more, or would it have cost you any more, had you permitted him to log that strip in there the way he wanted to, over and above the basis upon which you made the bid?

A. Quite a lot. It would have nearly doubled.

Q. Were you supervised down there by any one of the government engineers?

A. Oh, yes, all the time.

Q. Who was the engineer?

[fol. 262] A. Harry Smith was the local engineer.

Q. Do you know Mr. Geddes?

A. I do.

Q. Did he ever make an appearance down there?

A. Quit often.

Q. He was checking the job all the time?

A. Well, he came down.

Q. Did he ever make any complaint to you the work was not being carried out properly?

A. No.

Q. Do you know when the Pioneer Construction Company commenced their work down there?

A. On Brabston or Ashland?

Q. It would be the Brabston?

A. They worked first in Brabston and I think sometime in July——

The Court:

...17?

The Witness:

Yes, sir.

By Mr. Clarke:

Q. Approximately the same time you commenced work?

A. They started moving dirt a little before we did.

Q. Can you estimate that as to say the number of weeks?

A. I don't -now that. That was in August.

Q. Do you have any idea when they commenced their work in the neighborhood of the Roseland Plantation?

A. We did this work.

[fol. 263] Q. When did you do this?

A. In 1948—the summer of 1948, after we finished down here.

Q. But they did commence approximately the time you did?

A. I think a little ahead of time.

Mr. Clarke:

That is all.

Cross-examination.

By Mr. Benton:

Q. The Pioneer Construction Company, as I understand it, did the clearing on Roseland?

A. They did part of the clearing on Roseland.

Q. What part did they do?

A. They did the upper two-thirds of Item D. We did the lower third of D and all of E on Roseland.

Q. As I understand it, your testimony is you don't know exactly when they began that clearing but they began before you began operations?

A. I believe they did.

Q. Do you know how much clearing they did at the time you started?

A. I do not.

Q. The first operation you did was to do the clearing on your own land?

A. That is right.

Q. On that you progressed up to the point you indicated on this map when Mr. Mullin's man first came to your place?

A. Yes, sir.

Q. Your contract permitted you to do what you did, to push those trees down?

[fol. 264] A. Yes, sir.

Q. And if your contract hadn't permitted you to do that, your contract would have been higher?

A. That is right.

Q. You didn't intend to concede anything to Mr. Mullins on that point?

A. I conceded some to him.

Q. You didn't concede him the right to cut the logs?

A. I did not.

Q. There wasn't any compromise on that point?

A. I don't imagine.

Q. After you made this arrangement with him which did give him the right to do the salvage work, you got along all right?

A. Yes, sir.

Q. As a matter of fact, I assume some of those trees when they were pushed over, they were shattered, were they not?

A. They could have been.

Q. So far as the damage to the fiber of the tree is concerned for timber purposes, you are not in a position to testify about that?

A. I am not.

Q. Have you seen the pictures Mr. Mullins caused to be made out there?

A. No, sir.

Q. Will you look at these pictures offered in evidence as "P-9," "P-8" and "P-10" and "P-11" and state whether or not they show areas where you carried out this clearing on this Excelsior and home place?

A. It has been where somebody carried out clearing. I don't know that we did it.

Q. Does that look like it could have been?

A. It could have been.

[fol. 265] Mr. Benton:

That is all.

W. G. Green, called as a witness on behalf of the government and 3rd party defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Clarke:

Q. Where do you live, Mr. Green?

A. I live in Natchez, Mississippi.

Q. What is the nature of your business?

A. I am a partner of the H. B. Blanks Construction Company.

Q. Do you know Mr. Mullins with the General Box Company.

A. Yes, sir.

Q. You heard what Mr. Farmer had to say a few moments ago with reference to an agreement he had with Mr. Mullins about salvaging timber on the Brabston Levee enlargement?

A. I did.

Q. Were you informed of that agreement?

A. Yes.

Q. Do you know the plant engineer of the General Box Company?

A. Mr. Forrester, you mean; Dave Forrester?

A. Yes.

Q. Was he plant engineer of the General Box Company plant during the year 1947?

A. At Natchez, yes, sir.

Q. Did you remember having any conversation with him regarding this clearing and salvaging of timber down there by your company?

[fol. 266] A. Yes, I would say about a week after the plan had gone into operation, I saw Mr. Forrester in Natchez and we were discussing the agreement and the method being used and he said he was very well satisfied with it.

Q. Did he have any complaints at all?

A. He said the only complaint was a few trees were splitting, but he thought us clearing out underneath the trees was making it more accessible, which overcame whatever little damage we did on the splitting.

Q. That was your conversation with Mr. Forrester, the plant engineer of the General Box Company?

A. In Natchez, yes, sir.

Q. You don't know anything else about any of the agreements, or anything of that sort?

A. That w-s the only conversation. He said he was pleased with it, or had no objection to it and the only loss was splitting a few trees. Otherwise, he was very well satisfied with it.

Mr. Clarke:

That is all.

Cross-examination.

By Mr. Benton:

Q. Didn't you know, as a matter of fact, Mr. Mullins made a strenuous effort to go out there and log those trees in the regular fashion as soon as he found out about this transaction?

A. I knew it afterwards, yes.

Q. You knew he had gone -ut there?

A. Yes, sir.

[fol. 267] Q. And you knew he protested violently?

A. I knew he was cutting trees.

Q. You knew he made an effort to log those trees in the regular fashion?

A. You mean before the agreement?

Q. As soon as he found out this clearing was going on, didn't he make a strenuous effort to log the trees?

A. I don't know. I wasn't there.

Q. You heard the testimony of the gentleman who preceded you on the stand. You don't deny it?

A. No.

Q. You are not trying to deny or dispute it at all what he said about what developed out there?

A. Not a bit.

Q. On how this so-called agreement came about?

A. Not a bit.

Q. Didn't he discuss with you what had transpired between him and Mr. Mullins?

A. He did.

Q. And he was representing you in the matter?

A. Exactly.

Q. And he made the plan known to you, a fact which you also agreed to?

A. Yes, sir.

Q. And under your contract you had a right to push those trees over?

A. That is right.

Q. How long have you been engaged in the levee business?

A. Fifteen, eighteen years.

Q. You know, of course, what the effect is that a bull-dozer has in pushing a tree over? You know what that causes to the tissue of the tree?

A. I do not because I am not a timber man.

[fol. 268] Q. You heard what Mr. Mullins testified in that respect?

A. Yes.

Q. He testified none of this timber was available for veneering purposes. Do you deny that?

A. Certainly not.

Q. He said it was necessary for him to use it to make some type of lumber out of it and that one-third of the timber was completely lost by virtue of damage to the trees. Do you deny that?

A. No.

Q. Did you ever discuss that with this gentleman whose name you mentioned a moment ago?

A. Mr. Forrester?

Q. Yes.

A. That is the only conversation I had with him.

Q. You had a casual conversation one week after this clearing started?

A. After we cleared under this agreement.

Q. You never had any conversation with him after that?

A. No.

Q. You don't know anything about the damage caused to these trees?

A. No. I am telling you what Mr. Forrester told me a week after the agreement went in effect.

The Court:

We will recess until 9:00 o'clock tomorrow morning.

(Whereupon a recess was taken in the trial of the case to 9:00 o'clock, February 7th, 1952.)

[fol. 269] Alexandria, Louisiana, February 7th, 1952, at 9:00 o'clock A. M., all parties being present in Court the trial of the case was resumed as follows:

All right, gentlemen, let us go.

Mr. Benton:

If Your Honor please, we would like to at this time move to make an oral motion that we be permitted to amend the damage claim we have asserted as to the Home Place so as to increase the amount to $10,000. We claim $9,000. Under the evidence, we believe we have shown damages in the neighborhood of $12,000. We want to be permitted to raise the amount to the maximum limit allowed.

Mr. Fleniken:

If Your Honor please, we strenously object to him amending his pleadings at this time. We agreed to the amendment to include certain other things previously but we haven't offered too much evidence so far on the quantum and we seriously object to him amending his pleadings now to ask for more than he asked for previously.

The Court:

It is a question of increasing your demand in a tort action, Mr. Benton?

Mr. Benton:

I would say a claim arising under the Tucker Act and I should think it would, of course, address itself to the discretion of the Court. I see no reason why the defendant would suffer any embarrassment or any prejudice bearing on the [fol. 270] question of quantum. We really have proved more damages to the Home Place plantation than we have anticipated.

The Court:

Why is it limited to $10,000 in tort?

Mr. Benton:

There is no limit there at all and for that reason we wanted to increase it to the maximum allowed under the limits prescribed by the Tucker Act.

The Court:

I am not prepared to rule on that now. I will leave if it be determined when I come to consider the case and if you are legally entitled to amend it after the year has run, then I will consider it. Otherwise, I won't.

Mr. Benton:

The prescriptive period prescribed by the Act is six years, by the Tucker Act, and under the Tort Act it is two years.

The Court:

I think all this happened in 1947 so that would be prescribed even in two years.

I will have to look into the legal phase of it before I am prepared to rule.

Proceed with the trial.

[fol. 271] JOHN R. CURREY, recalled as a witness on behalf of the government and 3rd party defendant, having previously been duly sworn, testified further as follows:

Direct examination.

By Mr. Fleniken:

Q. Mr. Currey, you previously testified you were Chief of the Photographic section of the Corps of Engineers?

A. Yes, sir, I am Chief of the Topographic Section and in that section I maintain all the files of aerial photographs for the Vicksburg District.

Q. Mr. Currey, I hand you document marked for identification "G-26" and ask you if you can identify that and, if so, where it came from?

A. This photograph was flown by the Magnolia Airways Aerial Surveys of Laurel, Mississippi and it was flown on the 29th of October.

Q. Of what year?

A. 1947. It is identified by Row M.-1, flight 9, photograph No. 124. The approximate scale of it is 1 to 20,000.

Q. Does that photograph include any portion of the levee involved in these two cases, Mr. Currey?

A. It shows the part of the Roseland plantation adjacent and along the levee.

Q. And have you shown in there any marks by which that might be compared with the exhibit here marked "P-5" and "G-25" in evidence?

A. I have shown a mark where the Blanks Construction Company stopped work and where the Pioneer Construction Company began work.

[fol. 272] Q. Can you take this map "P-5" and "G-25" and indicate on it what portion of this map "G-26" is shown?

That is the upper right-hand or east corner of the map?

A. I would say it is the northeast corner of the map and it could be further identified as Item D.

The Court:

Northeast corner of Exhibit "P-5", "G-25"?

The Witness:

Yes, sir.

By Mr. Fleniken:

Q. What does this photograph identified as "G-26" show with reference to construction on the ground at the time, Mr. Currey?

A. It shows there has been no change in clearing operations from the lower end of the Roseland Plantation, up to this mark which is identified as Station 6435 Item D. Brabston Levee enlargement.

Q. Could you estimate the approximate extent of the work having been done along the levee, or on the levee, on this map along the Roseland plantation at that time, that is, October 29th, 1947?

A. I have subtracted station numbers. I arrived at fifty-seven one-hundredths miles above, or north, of this point which has been cleared and one and two-thirds miles south of this point has not been cleared.

Q. And that was on October 29th, 1947?

A. That was on October 29th, 1947.

[fol. 273] Mr. Fleniken:

If Your Honor please, for identification, we would like to offer and file in evidence document marked "G-26".

(Whereupon the above described document was marked "G-26" and filed in evidence with the Clerk.)

Mr. Fleniken:

That is all.

Cross-examination.

By Mr. Benton:

Q. I don't know that I understand you exactly, Mr. Currey.

When you speak about a mile and two-thirds that was not cleared, do you refer to the line along the levee which is to the right of the red mark in the center of the photograph?

A. I have subtracted station numbers along the levee from this point to this point (indicating).

Q. And from this point that you mention, that is what point?

A. Station 6435 plus zero zero.

Q. To what point?

A. To point 6, 6536 plus zero zero.

Q. The latter station isn't indicated on this photograph, is it?

A. I can put it on.

Q. I guess you better.

(Witness complies with request of counsel.)

[fol. 274] Q. From station 6435 to station 6536, zero zero in both cases, covers the area that was contracted by whom; the Pioneer Construction Company or the Blanks Construction Company?

A. It was contracted by Pioneer and worked by Blanks according to the statement of Mr. Farmer.

Q. Some portion of it was contracted by Blanks; isn't that correct?

A. I am not in authority to say who contracted it. Mr. Farmer informed me this was the area he worked.

Q. The area he worked off of the Pioneer Contract?

A. The area that he worked in the Brabston levee enlargement contract.

Q. The only thing I am getting at is there were two contracts and I haven't identified the Brabston levee contract completely in my own mind in relation to whether it was to be done and performed by the Pioneer Construction Company or the Blanks Construction Company. The point I am trying to establish is the area of the two photographs mentioned—whether that represents work that was to be included originally on the Blanks contract or the Pioneer contract?

A. I can only tell you what has been told me and I can illustrate very well on the big mosaic in comparison with these two.

Q. We are dealing with hearsay. Is that what your evidence is based on—what somebody told you?

A. My evidence is to where this point is, which is based on Mr. Farmer's statement. He claimed to this point (indicating).

Q. But you can't say whether he did that clearing under his original contract with the government or whether he did it with an exchange of work between him and the other contrac-ors; is that right?

[fol. 275] A. I am not familiar with the agreements that were made between Pioneer and the Blanks Construction Company but I can say that is a part of the Brabston levee enlargement contract.

Q. Let me ask you this: This area then between Station 6435 and 6536, according to your testimony, is an area which at the time of this enlargement was made, had not been cleared?

A. That is correct. I say it has not been cleared because the area here is exactly the same in photographic vision as the area on the 1945 photograph. The area above shows

lots of white lines which indicate work has been done and the area below indicates white lines which indicates the levee work has been completed.

Q. The area above—you mean above Station 6435 zero zero going in the opposite direction?

A. Going north.

Q. And that goes north to the end of the Roseland plantation?

A. To the end and beyond.

Q. Beyond?

A. Yes, sir.

Q. But this point, fifty-seven miles, what does that include, which is north of 6435 zero zero?

A. That represents the area from the north end of Roseland plantation to what is 6435 zero zero.

A. That is correct.

Q. When did you first examine this map yourself?

A. I examined the map in the office several times.

Q. When did you examine it for the purpose of establishing this present picture about which you are now testifying? [fol. 276] A. I examined it several times in the office.

Q. Is there any date on this map?

A. There is no date on the photograph but I have the dates copied from the official records from the Magnolia Aerial Surveys in Laurel, Mississippi and it gives me the contract number which is M-1 and it is also identified by the photograph number and plat number. This, in turn, is posted on my quadrangle index which I personally checked and which shows exactly this same area in which the Roseland plantation is located.

Q. Will you please take this map and indicate about where the new borrow pit was constructed—it had not been constructed at the time this map was made. About where was it constructed?

Did you know about where the borrow pit was constructed in the area between 6435 and 6536?

A. I can only do that from the photograph that was flown after the borrow pit was constructed. I can also put it on here, the same line shown in red on the mosaic.

Mr. Fleniken:

Th-t is "P-5"?

The Witness:

That is correct.

By Mr. Benton:

Q. Any interpretation you make on this map as to timber that was there or was not there depends on looking on the map and seeing there was timber there or not there?

A. You can tell woods from cleared fields.

[fol. 277] Q. I am going to indicate a line with my pencil which lies between Station 6435 and Station 6536, a very definite well defined clear line where there was a clearing which is north of the old levee and I want to ask you what that represents.

I am running my pencil along that line—this area all through here (indicating).

A. That is in a cleared area.

Q. That is in a cleared area, is it not?

A. Yes.

Q. How far does that cleared area run north of this line from 6435 in the direction of Station 6536?

A. The area which you are covering is approximately half of the area involved and I would have to scale that to arrive at a distance. I can give you a distance on fractional parts of an inch.

Q. Have you actually been on this ground yourself?

A. I have not.

Q. The only information you have about cleared land, or otherwise, is based on what you see on the map?

A. Yes, sir.

Q. This line which I indicated already, you say that indicates the cleared area?

A. The cleared area, or grown up in small weeds.

Q. It looks almost as clear to me as any other part. Is that the way it looks to you?

A. This indicates there is no growth at all (indicating). The blackness indicates something was growing on it. It may be weeds. This is the area you are describing (indicating).

Q. The area which I am describing is where I am marking with my pencil, where you see a white line?

[fol. 278] A. You are running your pencil along the road.

Q. How do you know that?

A. Because from previous identification and checking photographs in the field. We see the road on top of the levee.

Q. Isn't it true the road you are speaking about does go on top of the levee?

A. Yes, sir.

Q. The line I am following is not on top of the levee, is it?

A. No, it is not.

Mr. Benton:

That is all.

Mr. Fleniken:

That is all, Mr. Currey.

Francis N. Geddes, called as a witness on behalf of the government and 3rd party defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fleniken:

Q. You are Mr. F. N. Geddes?

A. That is correct.

Q. And where do you live, Mr. Geddes?

A. Natchez, Mississippi.

Q. By whom are you employed?

A. Corps of Engineers, United States Army.

Q. In the Vicksburg District?

A. That is right.

[fol. 279] Q. How long have you been employed by the Corps of Engineers?

A. Approximately twenty-four years.

Q. In what capacity are you serving now?

A. As the Area Engineer in charge of the Vidalia area field office.

Q. In that capacity, do you inspect the progress of work going on in your area?

A. I do.

Q. Did you have occasion, Mr. Geddes, to inspect the work as it was progressing along the Brabston and Ashland levees in Concordia Parish, Louisiana?

A. I did.

Q. Do you recall who did the construction work, Mr. Geddes?

A. It was done by two contractors, H. B. Blanks Construction Company and the Pioneer Construction Company.

Q. Do you know about when that work was begun, Mr. Geddes?

A. My records show the first work done on the site was on July 22, 1947.

Q. Does that show which particular area that was in, whether it was on the Brabston or Ashland?

A. That was done on Ashland.

Q. When was it completed on Ashland? Do you have that record?

A. All work was completed some time in the latter part of 1948. That included earth work, sodding, and all.

Q. Did that include the work on the Brabston and Ashland, or just the Ashland?

A. Both of them.

Q. When did the work begin on the Brabston? Do your records show that?

[fol. 280] A. On the 11th of August, 1947.

Q. Who did that work?

A. The first work which was done on the Brabston was done by Pioneer. The first work which was done on Ashland was done by Blanks.

Q. In the course of the work, did you have occasion to go down and inspect the work as it was progressing, Mr. Geddes?

A. Yes.

Q. And then did you have occasion to go around that area after the work was completed?

A. I did.

Q. Was that work done in accordance with good engineering practices?

A. It was.

Q. That applied to the location of the borrow pits and the clearing of the borrow pits for the taking of the dirt from them?

A. Yes.

Q. Mr. Geddes, did you at our request take exhibits "G-17" and "G-18" which are the high water gauge readings in the area of the Roseland plantation and the Excelsior and Home Place plantation, which are the properties involved in this suit and also the ground elevations as shown in exhibits "G-19" through "G-24" and make any computations from those exhibits?

A. Yes, I did.

Q. Will you give the Court the benefit of what you found there, Mr. Geddes, please?

A. First, I made some calculations to determine the average elevation of the ground in the borrow pit areas, or those areas which were cleared by this levee construction. These maps have certain soil borings on them which were [fol. 281] taken in the borrow pit area.

Q. Those are exhibits "G-19" through "G-24"?

A. That is correct. These borings show the elevation of the ground surface at the site where the borings were taken.

On the Roseland plantation there were twenty-nine borings taken in the borrow pit—at that time the proposed borrow pit area.

I took the elevation of those twenty-nine points, added them up, and arrived at an average of 55.0 feet above mean sea level.

On Excelsior, there was sixty borings within the proposed borrow pit area. I took the elevation of the ground at those sixty borings and arrived at an average elevation of 55.3 feet above mean sea level, that being the average elevation of the ground surface.

Q. What about your gauge readings, Mr. Geddes?

The Court:

Was that latter place, the 53, as against 55 further down towards the mouth of the river.

The Witness:

Yes, sir.

The Court:

Go ahead.

The Witness:

This exhibit "G-17" is a tabulation of the highest gauge readings recorded on the Natchez gauge for each year between 1911 and 1950, a total period of 40 years.
[fol. 282] I took those crest gauge readings and averaged them, then made an adjustment to compensate for the fact that the Natchez gauge is approximately 21 miles above Brabston and Ashland and then computed an average high water elevation at Brabston and Ashland.

Q. What did you arrive at there, Mr. Geddes?

A. For a point approximately opposite the middle of Roseland plantation, the average high water elevation in the river was 58.2 feet above the mean sea level.

For a point approximately opposite the middle of Home Place and Excelsior, the average high water elevation was 57.3 feet—mean sea level. The second one is the one being furthest downstream.

We also made this similar computation using the elevation of what the high water gauges were which we had in the vicinity of this work.

Q. And those are shown on exhibit "G-16", the quadrangle?

A. The location of these gauges are shown on "G-16". The readings which were obtained on the gauges are shown on exhibit "G-18".

We took an average of all those crest readings between the dates of 1928 and 1950 which were a total of 17 years, there being some years when the gauges were not read. By that method I arrived at an average high water elevation opposite the approximate center of the Roseland plantation as being 59.1 above mean sea level and an average high water elevation opposite Home Place of 57.8 feet above mean sea level.

The Court:

How far are those two places with reference to the river?

[fol. 283] The Witness:

They are about five miles.

Mr. Fleniken:

We tender the witness.

Cross examination.

By Mr. Benton:

Q. Do you know anything about the history of this particular levee, as to when it was first constructed there?

A. It has been a good many years ago. I couldn't give you the exact date.

Q. Can you give an approximate date?

A. Oh, I can only say I believe in the early nineteen hundreds.

Q. Do you know by whom it was constructed?

A. No, sir.

Q. Do you know whether it was constructed by the Federal Government or by the state?

A. I believe it was constructed jointly, each contributing to the construction cost.

Q. Are you familiar with the history of this levee from the time of the adoption of the so-called Flood Control Act?

A. General, yes, sir.

Q. When was that, if you remember?

A. When was what?

Q. What year was that?

A. What year was what?

Q. That the Flood Control Act became operative, if you remember.

A. There have been a number of them.

[fol. 284] Q. Talking about the first one?

A. That was 1928.

Q. Do you know what has been done by the Federal Government with reference to the reconstruction or repair of that levee in this area since that time?

A. Yes, sir.

Q. Just briefly what has been done?

A. In 1929—I would say in 1927 there was a crevasse on this levee near the upper end of Roseland plantation and in

1928 there was a loop levee built around that crevasse to close it. In 1929 there was a small set-back made near the lower end of Roseland plantation due to the fact that the bank car-in was threatening the existing levee at that time. That location is also within the limits of these plantations in the next work was done in about 1938 which consisted of a very small enlargement to this levee and the widening of the crown and the building of a gravel road on top of it and then that was the last work done until this enlargement work commenced in 1947.

Q. By whom was all that work done since the Flood Control Act became operative in 1928?

A. It was done by the government or its contractors.

Q. It was all done under contracts let by the government?

A. Some was done by hired labor.

Q. But all under the supervision of the Corps of Engineers of the United States?

A. The actual work, yes, sir.

Q. Under the Flood Control Act?

A. Yes, sir.

Q. This date, July 22nd, 1947, as I understand your testimony is the day when clearing began on the Roseland [fol. 285] plantation for this present project, the one we are talking about?

A. That is the date it began on Ashland plantation.

Q. Ashland is not identified——

A. Ashland levee, which is Excelsior and Home Place.

Q. That is the levee which involves Excelsior and Home Place?

A. Yes, sir.

Q. And your testimony otherwise is that the clearing on Brabston, which according to your testimony, would be the Roseland plantation, began in August 1947?

A. That is correct.

Q. The contractors in both of these cases, both the Pioneer Construction Company and the Blanks Construction Company, were authorized under the provisions of their contract to push down and destroy the trees in the necessary rights-of-way; is that correct?

A. They were authorized to do the necessary clearing in the manner which they saw fit.

Q. Can you state what the difference in cost to the United

State Government would have been in paying for the clearing for these rights-of-way if instead of allowing the contractor to push the trees over with bull-dozers, contractors had been required to either allow the owners of timber to cut and remove it, thereby necessitating the removal of stumps, or the contractors themselves would have been required to cut and to conserve this timber. In such event, what would have been the increased cost to the government? [fol. 286] A. Well, it would have been substantially greater. I don't know if I could give you an estimate in dollars and cents.

Q. It would have been, however, substantially greater?

A. Yes, sir.

Q. Is that the reason why when you call for bids under plans and specifications provided for by you that you allow the contractor to remove this growth in the method which was most convenient to him?

A. That is one of the reasons, yes, sir.

Q. Will you refer to the twenty-nine borings that you mentioned on Roseland, if you have them without too much trouble, and will you call off the lowest elevations, say, the ten lowest elevations? I am now using the mean sea level.

A. I can give you the lowest very easily. The lowest elevation is 51.0 feet above mean sea level.

Q. Go ahead.

A. I believe the next one is 51.5, 52.2; another is 52.2, 52.8; there is another 52.8.

Q. Will you call off, say, the five highest?

A. The highest is 58.4.

Q. That is the very highest?

A. That is the highest. However, the location of that boring shown on exhibit "G-19" indicates that it might be on an artificial mound of some kind. I am not sure of that. That is just a possibility.

Q. 58.4?

A. That is the highest. The next is 58.0.

Q. That is on Roseland?

A. That is all on Roseland.

Q. What is the next below that 58?

A. 57.9.

[fol. 287] Q. Give me the highest on the Home Place where you made sixty borings?

A. Just the highest?

Q. Yes, sir.

A. The highest is 57.6.

Q. That is 57.6 as against, I believe you said, 57.8 was the average mean sea level of the river; is that right?

A. 57.8.

Q. You can stop at that point.

Now, if you just consider the Natchez gauge, on the gauge readings, are you in a position to state without going to too much trouble, what the average mean sea level of the river would be based on the Natchez gauge, say, for the first twenty years of the forty year period that these readings cover?

A. No, sir, not without a lot of calculation.

Q. You would have to make a separate calculation?

A. Yes, sir.

Q. Does this information you have here on these exhibits—it shows the individual readings year by year of the Natchez gauge over the whole forty year period?

A. Yes, sir.

Q. As a United States Army Engineer connected with the development of levee control on the Mississippi River, can you state to what extent the average high mean level of the Mississippi River, based on yearly readings, has been influenced during the past twenty years due to improvements in the levee controls and confining of the water to channels within the boundaries of straight levee controls?

A. By levees there has been practically no change, or no effect from levee construction in the height of the river at this particular location.

[fol. 288] Q. You mean there has been no change, according to your idea, if you check these gauge readings at Natchez for the first twenty years and average those gauge readings over that period of time to establish this average level, that it would compare with figures revealed during the last twenty years?

A. No, sir, not necessarily. I said levee construction had no effect.

The Court:

What he is trying to find out is the mean water level in the river?

Mr. Benton:

That is it exactly.

The Court:

Any variation of the narrowing of the channel and confining the river to its banks and levees instead of letting it spread out over the earth?

The Witness:

That was all done more than twenty years ago. Therefore, for at least twenty years it had no effect.

By Mr. Benton:

Q. How far would you have to go back to get a period that would be a fair test of the conditions which prevailed before these levees were constructed?

A. Oh, possibly a hundred years or more because ever since that time we have had levees which confined this river.

Q. Is it your testimony that the systems of levee controls of the Mississippi River have never been as confining, say, [fol. 289] during the whole forty year period as has been true under the improvements made during the last twenty years?

A. No, sir.

Q. What bearing would that difference in improvements make on the average level of the river at this point, if any—the improvements you have been making, the strengthening of levees and confining of the river in various sections of the Mississippi Valley? What influence did that have on the level of the river at this point in the last twenty years?

A. I would say the only effect it would have in the last twenty years is that there have been no crevasses in the main Mississippi levees except one at Port Allen a year or two ago, and compared before that time, before high water, there would be crevasses and let a lot of water out of the river and, therefore, tend to reduce floor heights in the river.

Q. Let me ask you this: Would you look at those Natchez gauges, please, sir, and take the first ten years of the Natchez gauges and give me the sea level of the river that you mentioned in determining that average for the Natchez gauge?

The Court:

That is going to take some time, isn't it, Mr. Geddes?

The Witness:

I will need an adding machine.

By Mr. Benton:

Q. Just give the individual figures?

[fol. 290] The Court:

You want him to give the gauges, or you want him to average it?

Mr. Benton:

No, sir, just give the year and the reading.

The Witness:

Starting with 1911—this is the reading in feet above mean sea level?

Mr. Benton:

Yes, sir.

The Court:

That is the high water mark?

The Witness:

High water mark. 61.6, 68.7, 69.9, 59.3, 61.2, 70.8, 67.2, 53.7, 63.0, 67.8, in 1920.

By Mr. Benton:

Q. You made a reconcilation between the Natchez gauges and this area due to the difference in mileage, and quite evidently from the figures you read off you discount quite a substantial amount in levels?

A. You have to make two adjustments to these Natchez gauge readings. First, you have to add 17.3 feet to convert the gauge readings to mean sea level. Then you have to subtract from that the slope in the river between Natchez and Brabston and Ashland.

Q. Subtract the level of the river?

A. Yes, sir.

Q. What is that subtraction?

[fol. 291] A. It averaged from Natchez to lower Glasscock gauge 6.5 feet. From Natchez to G-14 gauge, which is a little further downstream, 7 feet.

The Court:

You add the same 17 feet to the stations above Natchez that you added to the Natchez station?

The Witness:

That is just the zero of the Natchez gauge.

By Mr. Benton:

Q. When you read those readings a minute ago from Natchez, were you adding that 17 feet?

A. I was.

Q. That gives you the mean sea level?

A. That gives me mean sea level.

Q. But you had not subtracted the drop in the river when you read those figures a moment ago?

A. I have not.

(Whereupon at this point there was a discussion off the record between Court and counsel.)

By Mr. Benton:

Q. As I understand your testimony, the only information you got about levels in the Mississippi River would be the Natchez gauge readings which go back to 1911; isn't that correct?

A. Would you say that again?

Q. The only information you got here in establishing the only average high level of the Mississippi River is based, at most, on the Natchez gauge readings going back to 1911?

[fol. 292] A. No, we also have these four high water gauges which were located in the vicinity of this work.

Q. But all of those gauge readings were since 1928, were they not? They were certainly much closer?

A. They were scattered through the period of 1928 through 1950.

Q. You have no other information as to what the average ordinary high level of the Mississippi River was, say, prior to 1911?

A. No, sir.

(Whereupon at this point there was a discussion off the record between Court and counsel.)

By Mr. Benton:

Q. Would you refer to what you call the quadrangle that you have there? Would you examine the quadrangle in question which shows the property here involved, the Excelsior and the Roseland plantations, and would you examine the meander lines that are indicated on that map beginning with a meander line dated 1828 and 1829 and state to the Court what change, if any, has been occurring in the Mississippi River at that point—or to put it another way, has the river been encroaching on that property, or has it been receding?

A. I can't distinguish those meander lines. It is apparently marked over with ink, but I would say, as far as Roseland, I believe the indications are that the river had been encroaching upon the property.

Q. Is there a thing on this map to show that, or is that just a surmise on your part? I don't see any meander lines at all at that point?

[fol. 293] A. I can't see the meander lines, as I stated before, but I do know from personal knowledge in inspecting the site that the bank in front of the Roseland plantation was receding for a number of years prior to about 1935 when the Glasscock cut was opened about 1935 and that attack was relieved and the bank has been stable since that time.

Q. Is there anything on this quadrangle to indicate what is north and what is south on it?

A. That is north (indicating).

The Court:

Referring to the top of the map.

By Mr. Benton:

Q. Looking at Roseland, Roseland plantation shown on this map is approximately south of what is designated as Fairview and Mt. Zion Church, isn't that correct?

A. Yes, sir.

Q. The plantation to the north of Roseland indicated as Fairview is the one which comes closest to the Mississippi River; isn't that correct?

A. That is correct, yes, sir. However, it is my understanding that the lands in question include both Roseland and Fairview as shown on this map. You have been referring to it as Roseland but it really includes all those properties.

Q. Actually, the only property we are interested in here is Roseland, rather than Roseland and Fairview plantation?

A. The exhibit "G-16" before me shows that all the Fairview and Roseland are under consideration. As I say, we have been referring to it only as Roseland.

[fol. 294] The Court:

Is that ownership claimed as belonging to the transferrer of this plaintiff?.

Mr. Benton:

It may be, if Your Honor please. Come to think of it, it does. Roseland does include that part known as Fairview.

By Mr. Benton:

Q. Getting back to the distinction between those two, from the standpoint of identification on this map, the immediate area you have in mind where you say apparently prior to 1935 an encroachment by the river occurred, begins at a point designated on this map at approximately Fairview landing and going from that point north; isn't that correct. Isn't that where this encroachment was taking place?

A. That is approximately the location.

Q. Otherwise, picking the map up at the point of Fairview landing and going south, which includes the part of the properties specifically designated as Roseland which comes on down and includes the whole area of the Home Place; isn't it true the meander line shown on the map itself shows the Mississippi River since 1829 has been receding rather than encroaching on that bank?

A. That is correct.

Q. You stated a moment ago that you felt the construction of levees and confining of the river would have some bearing on the average high water level in the Mississippi River but you didn't attempt to make any estimate of what that difference might be at this particular point in answer [fol. 295] to the question I asked you and I am going to put another question and ask you this:

If we go back prior to 1900, take the year 1900, which is some fifty years ago, and take into account the conditions that prevailed on the Mississippi River prior to that time, the type of levee construction, and all that, are you in a position to give any rough approximation of the extent to which the ordinary high level of the Mississippi River has been influenced by a comparison of that period of time prior to 1900 with what has happened in the way of levee construction, or as result of levee construction since that time?

A. You mean strictly as a result of levee construction?

Q. And any other changes that have been made in flood control on the Mississippi River?

A. I couldn't give you any estimation in feet as to how much flood heights have been affected by levee construction. It would be my opinion that they have been raised somewhat, but as to how much, I don't know. There is one other big factor as far as flood control work alone is concerned—the cut-offs which have been made in the river. However, above Glasscock is the furthest downstream cut-off. Above there, there has been a material lowering in flood heights, but at the lower end of Glasscock, it would be my opinion there probably has not been much change due to the cut-offs.

Q. You recognize that there has been a change due to improved levee control, say, subsequent to 1900, that the average high ordinary level of the Mississippi River since

that time has been greater as a result of this new construction, but you are not in a position to estimate how much greater?

A. I am not.

[fol. 296] Mr. Benton:

That is all.

The Court:

Next witness.

Guy N. Hall, called as a witness on behalf of the government and 3rd party defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Clarke:

Q. Please state your name?

A. Guy N. Hall.

Q. Where do you live, Mr. Hall?

A. Dyersburg, Tennessee.

Q. By whom are you employed?

A. I am a member of the Pioneer Construction Company firm.

Q. What type of work does this particular firm do?

A. Road work, levee work, general dirt construction.

Q. Have you ever had any contract for levee construction? Have you had a contract for levee construction work in Concordia Parish, Louisiana?

A. Yes, sir.

Q. Do you know where the area is located that has been referred to as the Brabston area?

A. Yes, sir. It is referred to by item that we bid on.

Q. Did you have a project, or construction job, in the Brabston area?

[fol. 297] A. Yes, sir, I did.

Q. Do you know, or remember the names of the property or properties on which your construction work was performed?

A. They were known by items to me, as Item D and C or Ashland and D on Brabston.

Q. In connection with that project, did you also have any clearing work to be done?

A. Yes, sir.

Q. Did you carry out this clearing project yourself, or your company, or did you sublet it, or anything of that kind?

A. We did our own clearing.

Q. Do you remember whether or not you gave any instructions to your employees as to how the clearing of this right-of-way would be conducted?

A. Well, just in the usual manner.

Q. What do you mean by "a usual manner"?

A. Well, the way we always clear jobs.

The Court:

You mean bull-dozers and so forth?

The Witness:

Yes, sir.

By Mr. Clarke:

Q. Did you give any instructions to anyone at any time with reference to the salvaging of timber growing on the right-of-way?

Mr. Benton:

I object to leading questions.

[fol. 298] The Court:

Well, I don't think that is leading. He is not stating what the instructions were. It is merely asking for facts.

The Witness:

Yes, sir.

By Mr. Clarke:

Q. What was the nature of the instructions?

A. I instructed my clearing outfit to operate in the same manner that H. B. Blanks operates.

Q. Did you have personal knowledge as to how they were operating?

A. Yes, I did.

Q. You heard Mr. Farmer's testimony yesterday. Are you in agrement with him as to how the operation was performed by his company?

A. Definitely.

Q. Is that the same manner in which your company operated?

A. Definitely.

Q. Did you have any particular reason to give instructions to your employees with reference to the salvaging of the trees and timber growing on the right-of-way?

A. Yes, sir. One of my superintendents said someone from a box company contacted him and when they got to our item——

Mr. Benton:

If Your Honor please, we object to hearsay.

The Court:

He is describing the situation that happened.
[fol. 299] Go ahead.

Mr. Benton:

The only thing is I don't know exactly how important this might get to be.

The Court:

I want to get along, Mr. Benton. If it is not important, we will strike it out.

The Witness:

They told me someone had contacted him from a box company and they wanted us to agree to do as Blanks did, which we did, with respect to the timber. That was all there was to it.

The Court:

Did you do as Blanks did?

The Witness:

Yes, sir, for a short ways and they discontinued their operation.

The Court:

You mean you discontinued?

The Witness:

No, the box company discontinued their operation in salvaging the timber.

By Mr. Clarke:

Q. They didn't attempt to salvage the timber but just for a few days?

A. Just for a short while.

[fol. 300] Mr. Clarke:

That is all.

Cross-examination.

By Mr. Benton:

Q. When did you start the clearing on your part of this job, Mr. Hall?

A. The records show on August 11th, 1947.

Q. How much time did it take you to complete the clearing?

A. The complete job was finished in September of 1948.

Q. You talked about the time when you finished the job?

A. Yes, sir.

Q. When did you finish the clearing?

A. I have no idea.

Q. Did you know anything about the kind of timber that was located in the right-of-way that you cleared?

A. No, sir, other than generally clearing. I am not a timber man.

Q. You never made any check or any estimate of that timber at all, did you?

A. Not of the timber. I made an estimate of the cost of clearing the timber.

Q. As I understand it, for the Pioneer Construction Com-

pany under your contract with the government, you did some of the clearing and do I understand that the other contractor, H. B. Blanks, did some of the clearing under the contract?

A. Yes, sir.

Q. How much of your clearing did you do?

[fol. 301] A. Well, I will have to refer to the items. I did two-thirds of Item D on Brabston and I did two-thirds of Item B and all of C on Ashland.

Q. Then, apparently you did two-thirds of your clearing; is that right?

A. I did all my clearing but that is the amount of the Item.

Q. You did all of the clearing under your contract with the government?

A. Yes, sir.

Q. And you have no idea when you finished that clearing?

A. No, sir. Our records would show.

Q. Under your contract you bid on a basis where you could push over and destroy those trees; isn't that correct?

A. Yes, sir.

Q. And you proceeded to do that?

A. Yes, sir.

Q. Is it your testimony that at any time during that clearing process—at any time—that there ever was any attempt to salvage any part of that timber?

A. Yes, sir, there was.

Q. By whom?

A. By the box company.

Q. By what box company?

A. That one in Natchez.

Q. Do you have anything to do with that box company?

A. No, sir.

Q. Did you have anything to do with Mr. Mullins of the box company?

A. I don't recall.

Q. Did you ever make any effort to contact him or anybody else connected with that company?

[fol. 302] A. No, sir.

Q. When did you know that the box company had an interest in that timber?

A. When I found out they — been down and talked to Don Farmer with H. B. Blanks.

Q. You found that out by hearsay; is that right?

A. Yes, sir.

Q. Previous to that, you didn't know they had any interest?

A. I sure didn't.

Q. At that time when they went down and talked with Mr. Farmer of the Blanks Construction Company, how far had you progressed with your clearing?

A. Quite a ways.

Q. Mr. Mullins says at that time you had finished your clearing. Would you dispute that?

A. Yes, sir, I would dispute that.

Q. You progressed quite a ways and he said you finished it. How nearly had you finished?

A. We finished the upper item but on B and C, we lacked quite a lot of clearing.

Q. Are you in a position to say how much was left when you heard about this thing?

A. There was two miles of it—I would say a mile and a half.

Q. Was finished or unfinished?

A. Unfinished.

Q. Were you actually on this job at any time when anybody attempted to salvage any of this timber?

A. I have seen their equipment out there. I haven't actually seen it working, no, sir.

Q. Do you know whose equipment that was?

A. Well, yes, sir. I knew it was the box company.

[fol. 303] Q. Did you ever have any dealings about timber under this contract with the J. M. Jones Lumber Company?

A. Oh, yes, sir.

Q. Wasn't it the J. M. Jones Lumber Company that was doing some salvaging up there?

A. They did some up above.

Q. That was the area included in this same contract?

A. Yes, sir.

Q. That extended off the Roseland plantation?

A. Extended upstream.

Q. And they were the ones doing salvaging in there?

A. On that end, yes, sir.

Q. Have you ever done this sort of work in Louisiana before? Had you done levee work in Louisiana before?

A. Yes, sir.

Q. Will you state the kind of equipment you saw there that was doing this salvaging?

A. Well, are you talking about on the upper end or the box company or the Jones Lumber Company?

Q. I am talking about what you say is the box company equipment?

A. That was along the lower end, so it would be two or three mechanical saws and a tractor or two and a log wagon or two and boom loader.

Q. When did this take place, this later salvaging you are talking about?

A. Well, it was—it must have been the late part of 1947.

Q. It must have been?

[fol. 304] A. Yes, sir.

Q. You can't fix a time at all?

A. No, sir, I can't.

Q. How long did that salvaging go on?

A. Well, I wouldn't say.

Q. How much of the time were you out there?

A. Oh, I was there every other week, approximately.

Q. During the time of the salvaging, how often were you out there?

A. Well, I don't know.

Q. You don't know how long it went on?

A. No, sir, I don't.

Q. You don't know when it began?

A. Well, I know approximately—I don't know the dates but I know the approximate time they started up there on Don's outfit.

Q. Did you ever talk to anybody that was carrying out that salvaging process?

A. I talked to Mr. Don Farmer.

Q. Did you talk with anybody that had anything to do with this so-called salvaging process whatever?

A. No, sir, other than Jones. I talked to Mr. Jones.

Q. But you never talked to anybody else?

A. I never talked with anyone connected with the box company.

Q. Have you ever had any dealings with this box company before?

A. No, sir.

Q. Have you ever had any dealings with them since?

A. Not that I know of.

Q. Have you ever had occasion to know of your own personal knowledge the identity of any single individual connected with the General Box Company?

[fol. 305] A. Not that I know of.

Q. And you never had any occasion to identify before or since any of the equipment of the General Box Company?

A. Well, what I seen down on the levee there. I suppose that was their equipment.

Q. You made the supposition that was it?

A. Yes, sir.

Q. But you had no prior knowledge to confirm that since?

A. No.

Q. And you had had no subsequent knowledge, to confirm it?

A. All I know is hearsay about it.

The Court:

Is there any contention anybody salvaged lumber except the box company?

Mr. Benton:

We didn't salvage any of his lumber at all.

The Court:

That is your contention. He is supposed to tell the truth to the best of his recollection.

Mr. Benton:

I think he is doing it satisfactorily, as far as that goes.

The Court:

It is about five years ago and there is a chance for memories to grow dim all around.

[fol. 306] Mr. Benton:

That is all.

S. C. SMITH, called as a witness on behalf of the government and 3rd party defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Clarke:

Q. Mr. Smith, where do you live?
A. Tallulah, Louisiana.
Q. By whom are you employed?
A. Department of Public Works, State of Louisiana.
Q. Do you have a profession, or are you a professional man?
A. Yes, sir, a Civil Engineer.
Q. Graduate?
A. Yes, sir.
Q. From what university?
A. Louisiana State University.
Q. What year?
A. 1925.
Q. Have you been actively engaged in your profession since that time?
A. I have.
Q. How long have you been employed by the Department of Public Works?
A. Ten years this coming June.
Q. When you say "ten years" you mean by the Department of Public Works and by the State Engineers prior to that time?
[fol. 307] A. Yes, sir.
Q. In connection with your employment by the Department of Public Works, do you have any connection at all with the 5th Louisiana Levee District?
A. I am their Chief Adviser, Engineering Adviser, in levee construction and the acquisition of rights-of-way.
Q. Are you familiar with the area in Concordia Parish known as the Brabston area?

A. I am.

Q. Do you have occasion to advise with the Levee Board in connection with any levee work in that area?

A. I do.

Q. Did you?

A. Yes, sir.

Q. Do you remember the last work that was done in that area?

A. It was completed, to my best knowledge in 1948 in Brabston and Ashland.

Q. Did you have occasion to advise with the Levee Board regarding the construction of this project?

A. Yes, sir.. When the Board was asked by the Corps of Engineers to furnish the necessary right-of-way for this construction we, as engineers, go over the proposed project with the idea of seeing what they are doing—or the justification of their doing what they are doing and then we recommend to the Board as to whether to furnish the rights-of-way, or why not furnish them.

Q. Otherwise, we either approve or recommend the disapproval by the Board?

A. That is correct.

[fol. 308] Q. In connection with this last work in the Brabston area, did you consider that project for the Levee Board.

A. Yes, sir, I did.

Q. What was your action in connection with that consideration?

A. Well, our policy is that we are furnished the specifications and project maps to study and to go over the items and with that we make our recommendations to the Levee Board in writing.

Q. What was your recommendations in connection with t-is project?

A. My recommendations, as well as I remember, was to grant the right-of-way as requested.

Q. Under what conditions is it required that the Levee Board furnish rights-of-way to the Corps of Engineers the construction of Levees?

A. Well, the Levee Board is a state agency that works

jointly and in cooperation with the Corps of Engineers in all flood control work.

Q. Does the Levee Board furnish the Corps of Engineers a right-of-way free of cost under all circumstances?

Mr. Benton:

Pardon me. Wouldn't this be legal, Your Honor? It is covered by the statute.

The Court:

There is a statute. Of course, the statute would have to speak for itself.

Mr. Clarke:

May I ask him what was the common practice of the Levee Board?

[fol. 309] The Court:

It wouldn't make it legal unless it was in accordance with the law. You can find out what they do and not ask, in effect, what the law is about it.

By Mr. Clarke:

Q. What is the practice of the Levee Board with reference to furnishing rights-of-way to the government for levee construction?

A. Well, their practice and policy has been upon request for rights-of-way on flood control projects from the Corps of Engineers, they refer these requests to the Department of Public Works for their approval and recommendation as to furnishing these rights-of-way.

Q. Is there any distinction between the granting of a right-of-way for levee set-backs and with reference to levee enlargements?

A. Yes sir, there are. At this time rights-of-way for set-backs on the main stem of the Mississippi River, since 1941 the government pays a fair market value for lands used. On enlargement, they don't.

Mr. Benton:

Your Honor, that is strictly legal.

The Court:

It is, but he knows what the practice is. Whether he is doing it lawfully or not is something I will have to decide but he can tell what they are doing.

You charge what they are doing is illegal and the other side says it is lawful. Let us see what they are doing. I think he can state it as to what actually happened. It is not for him to interpret the law. If he doesn't stay within the law, it is just too bad.

[fol. 310] By Mr. Clarke:

Q. Will you state your reasons for approving this project known as the Brabston enlargement?

A. Yes, sir. After elimination of the Eudora Floodway, it was necessary to come back and enlarge the main line levees of the Mississippi River south of the proposed floodway to project grade and section, to what we call to take the project flood survey.

Q. Otherwise, this program at Brabston was a part of the project of increasing the height and the strengeth of the levee to grade and sections?

A. That is correct. In 1942 that was begun at Yonkeypen, Arkansas, the upper end of the proposed Eurdora Floodway and progressed in a south direction until now, with minor exceptions, the entire breach levee from Yonkeypen to Point Breeze has been enlarged to project grade and section. That, of course, is a project of two or three small sections that is practically project grade that has not been brought up to project grade.

Mr. Clarke:

Your witness.

Mr. Benton:

No questions.

Mr. Clarke:

I have one other question.

Q. Would you consider this project down at Brabston an enlargement or a set-back?

A. An enlargement.

[fol. 311] Mr. Clarke:

That is all.

Mr. Fleniken:

That is the government's case, if Your Honor please.

The Court:

Anything else for the plaintiff?

Mr. Benton:

Your Honor, we want a few minutes and I think we will put Mr. Mullins back on the stand.

The Court:

All right.

(Short recess.)

S. F. Mullins, recalled as a witness on behalf of the plaintiff, in rebuttal, having previously been duly sworn, testified further as follows:

Direct examination.

By Mr. Benton:

Q. Did you salvage or attempt to salvage any part of the timber on what is called the Roseland plantation?

A. No, sir, we did not.

The Court:

He testified to that yesterday.

[fol. 312] By Mr. Benton:

Q. Why didn't you, sir?

A. We were down there too late to do any salvaging.

Mr. Fleniken:

This is not rebuttal, if you Honor please. I object to the testimony.

The Court:

This is not rebuttal.

By Mr. Benton:

Q. When did you first move down there to begin your salvage operation?

A. September 13th, 1947.

Q. When did you complete the salvage of the timber being cut on the Excelsior and Home Place?

A. I couldn't say exactly. Sometime in November. I believe.

Q. During that period of time, to what extent were you using your salvaging facilities of your plant?

A. We had the entire company outfit and the labor down there salvaging.

Q. During any part of that time was there ever a time when you could have undertaken any salvaging on the Roseland plantation?

A. No, sir.

Q. Could you during that time have profitably undertaken any salvaging?

Mr. Fleniken:

If Your Honor please, I object to counsel leading his witness.

[fol. 313] The Court:

It is undoubtedly leading.

By Mr. Benton:

Q. State why you say during that time you could not have undertaken to salvage anything on the Roseland plantation?

A. In the first place, the only way we could salvage under those conditions was use a company outfit. A contractor wouldn't have undertaken a job like that because we would have had to pay him too much money and it would have been impractical and as I stated yesterday——

Mr. Fleniken:

This is just a repetition of what he testified, if Your Honor please.

The Court:

I don't see that you are offering anything in rebuttal.

By Mr. Benton:

Q. What kind of equipment did you own? You heard the testimony of Mr. Hall. What have you got to say about the type of equipment he described?

A. We had two caterpillar tractors, D-4, one with a bull-dozer on it and one with a winch; two Dodge trucks and a logger's dream and we had no mechanical saws. We never did own any mechanical saws.

Q. Did you at any time have a conversation with Mr. Nelson about your ownership of timber down there?

[fol. 314] A. At various times, yes, sir.

Q. What was the nature of the conversation you had with him about your ownership of that timber?

A. I think about the first knowledge, Mr. Nelson probably had we owned the land and timber on the Roseland plantation was when it was reported to the Levee Board that I had cut the levee in two with a bull-dozer at the Roseland plantation.

Q. When was that?

A. Late in 1946 and Mr. Nelson, of course, hurried down there and Mr. Shields called me and he told me to stop whatever we were doing immediately. Mr. Nelson met me there the next morning and said, "Well, Mr. Mullins, I can't see any damage here." We had put some gravel on the ramp leading from the Fairview house across the levee and I discussed with him the reason probably why this man reported me.

Q. The question is did he know at that time about your ownership of the timber?

A. We discussed it that morning, yes.

Q. Did he at any time thereafter——

Mr. Fleniken:

If Your Honor please, I don't remember anything Mr. Nelson testified with reference to the timber.

Mr. Benton:

He said he didn't know the box company owned the timber. Mr. Nelson admitted he didn't give the box company

any notice and he says he went to the assessor's office and got the information from the assessor's office.

[fol. 315] The Court:

I think the testimony is all right.

By Mr. Benton:

Q. Did he at any time prior to the beginning of these projects ever communicate with you about what the Levee Board was planning to do with your timber?

A. No, he did not.

Mr. Benton:

That is all.

Cross examination.

By Mr. Clarke:

Q. Mr. Mullins, what is your answer to the fact that this aerial photograph shows there was considerable timber undisturbed on Roseland as of October 29th?

A. I would say there was considerable timber undisturbed on October 29th.

Q. And then you moved in there to do your clearing in September?

A. No, sir, we did not.

Q. When did you first go in?

A. We moved to Excelsior September 13th, 1947.

Q. You did know, however, they were doing levee construction work on Roseland at that time?

A. At the time I went down there as borne out by Mr. Don Farmer's, the Pioneer Construction Company started two weeks in advance of them and the H. B. Blanks Construction Company had progressed a great distance down on their project. When I got there, the main borrow pit which [fol. 316] is off the point of this levee where you went around that crevasse, that borrow pit was cleared. It was more profitable for the General Box Company to carry on its operations where the timber was being destroyed by bull-dozers and Mr. Farmer had just informed me he could push it over before I got down there if I insisted on cutting. That is the reason I did not go into Roseland.

Q. Did you testify yesterday all of that timber had been destroyed on Roseland before you had an opportunity to even know about the job having commenced?

A. I said this clearing had been completed. As far as the Pioneer Construction Company, it was cleared.

Q. What do you have to say about that area in there that was not destroyed on October 29th?

A. The Pioneer Construction Company did not clear that area that is not destroyed.

Q. Who did?

A. H. B. Blanks Construction Company.

Q. So, you did salvage that timber eventually, didn't you?

A. No, sir, I did not.

Q. Why not?

A. Because the weather had gotten bad. We were forced to pull logs from the right-of-way off on to what I presume is our property and leave it because we couldn't haul it to the Mississippi River. We hauled logs out there in very adverse conditions and we didn't have the time to get up there to do it.

Q. Do you deny the fact that one of your employees contacted the Pioneer Construction Company requesting that they conduct their clearing operations on the same basis as the Blanks Construction Company was operating?

[fol. 317] A. I do not. I do in that particular case because the Pioneer Construction Company cleared the lower end of Excelsior.

Q. Do you mean by that you deny Pioneer ever having been contacted with reference to clearing?

A. Not with reference to clearing. I do deny they were contacted with reference to clearing on Roseland.

Q. I mean on any part of the job they operated on?

A. No, sir, I do not deny that.

Q. They were contacted?

A. They were contacted with reference to the extreme lower end of Excelsior which they did the clearing on and we did ask them to do it in the same manner the H. B. Blanks Construction Company had carried on.

Mr. Clarke:

That is all.

Mr. Benton:

That is all. We rest, if Your Honor please.

Reporter's Certificate to foregoing Transcript omitted in printing.

[fol. 318] IN UNITED STATES DISTRICT COURT

OPINION OF COURT—October 11, 1952

No. 2536 and No. 2804 (Consolidated).

For Plaintiff:

Messrs. Fred G. Benton, La. National Bank Building, Baton Rouge, Louisiana.
Carl C. Chadwick, Natchez, Mississippi.
Barnett, Barnett & Jones, 414½ E. Capitol Street, Jackson, Mississippi.
Jackson B. Davis, 408 Slattery Building, Shreveport, Louisiana.

For Defendant:

William J. Fleniken, United States Attorney, Shreveport, Louisiana.
Thompson L. Clarke, St. Joseph, Louisiana.

DAWKINS, J.:

These two cases present the same issues and have been consolidated for trial and decision. They involve claims for [fol. 319] the value of timber alleged to have been destroyed in the enlargement of a levee on the main stream of the Mississippi River. The first numbered was filed November 30, 1948, and the second on October 19, 1949. The demands were made under the Tucker Act and, in the alternative, the Federal Tort Claims Act, but the latter ground has been abandoned.

Alleging itself to be the owner and in possession for more than one year of certain timber adjacent to the levee, as

disclosed by copies of deeds or conveyances annexed, the complainant charges that defendant and its agents "willfully, arbitrarily and wantonly destroyed the said timber * * * to the value", in each case, of $9,000.00, "without the knowledge, consent and permission of plaintiff", at a time when defendant knew or was charged with "knowledge of plaintiff's said ownership"; that said conduct was contrary to and in violation of both the federal and state laws dealing with such matters, particularly the Fifth Amendment of the Federal Constitution, requiring adequate compensation for private property taken for public purposes; and that said work was done under the "Flood Control Program involving the whole of the lower Mississippi River."

Motions to dismiss both cases on the ground that the complaint did not state claims upon which relief could be granted were overruled, and a third party complaint was filed by the defendant on January 31, 1951, bringing in the Fifth Louisiana Levee District as a defendant.

[fol. 320] Other preliminary matters having been disposed of, the case was tried upon its merits, both as to the main demand and the third party complaint. There is no denial that timber belonging to the plaintiff was destroyed, but there is a dispute as to the quantity and value. The issues otherwise are largely those of law.

Plaintiff states its contention under three headings: (1) the Federal Flood Control Act (Tit. 33, Sec. 701, et seq., U.S.C.) as amended by the Act of August 18, 1941, "suspends operation of the state law in reference to the acquisition of rights of way insofar as local contributions are concerned"; (2) that it is admitted the timber was destroyed in the prosecution of "lower Mississippi River Project under the 1941 amendment of the Flood Control Act which supersedes" the state laws of riparian servitude "as to local contribution * * *"; (3) there was no appropriation or expropriation of the timber by either the Government or State; and (4) the timber was destroyed without notice to the owners and in an unreasonable and unnecessary manner.

On the other hand, defendant: (1) denies any liability or responsibility whatever, and alleges that the Fifth Louisiana Levee District was bound under federal law to furnish the rights of way without cost to the Government, for which

reason, if recovery is allowed, it should have judgment over and against said Board; (2) that the Board exercised its lawful power of appropriation under the servitude imposed by the Civil Code of Louisiana (Art. 707 et seq.), and if not, then the Government was empowered to do so under its own [fol. 321] right; and (3) neither the nation nor the Board is liable for the destruction of the timber for the reason that it was growing on batture, which is excluded as compensable by Sec. 6 of Art. XVI of the State Constitution; and, in the alternative, if not batture, then neither the Government nor the Board is liable therefor because "plaintiff neither proved nor alleged the assessed value of the property" as it was required to do under the said provision of the State Constitution.

The facts are found specifically as follows:

In Case No. 2536, the timber which was on Roseland Plantation was first acquired by plaintiff's predecessor, Natchez Veneer Company, in April, 1943, from one John A. Birdwell. Plaintiff acquired the property of the Veneer Company about 1945; and because the time for cutting was about to expire, on September 21, 1946, it purchased, for the price of $30,000.00, the property in fee, including the timber. It then sold the land to Orrin James on the 15th day of November of that year, for the sum of $15,000.00. In the sale to James, plaintiff reserved "all the timber of every kind and character whatsoever now standing, growing and being on the above described lands, or which may hereafter grow thereon, for a period of twenty (20) years * * *".

In Case No. 2804, the timber was a part of that which was purchased from R. B. Sharp on April 9, 1947, for the price of $36,000.00, by a deed reciting that plaintiff was "to have ten (10) years from the date of this deed for the removal * * * and at the end of said period, all timber uncut and [fol. 322] removed is to revert to the vendor".

As stated earlier, there is no dispute that the timber was destroyed, but the amount and value is in contest. Boiled down, the legal questions are: first, did the Government or Levee Board have the legal right to destroy it without paying its fair value, or at least the assessed value; and second, did the fact that it was not assessed separately for the year 1947 prevent the plaintiff from recovering even that value? There are also incidental issues as to whether, in taking

and destroying the timber; the Government could avail itself of the limitations of Sec. 6 of Art. XVI of the State Constitution through its own action or that of the Levee Board; and, finally, was the land on which the timber growing batture, excluded as compensable by that Article.

The Fifth Amendment to the Federal Constitution provides, among other things, "* * * nor shall private property be taken for public use, without just compensation". This, of course, applies to the Federal Government.

The State Constitution also provides (Art. I, Sec. 2, that:

"No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."

[fol. 323] Art. XVI, Sections 5 and 6, dealing with levees, declares:

Sec. 5: "All governing authorities of districts which have been, or may be created, are authorized to cooperate with the Federal Government in the construction and maintenance of the levees in this State, on such terms and conditions as may be provided by the Federal authorities and accepted by the State authorities."

Sec. 6: "Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes shall be paid for at a price not to exceed the assessed value for the preceding year; provided, this shall not apply to batture, nor to property control of which is vested in the State or any subdivision thereof for the purpose of commerce.

"If the district has no other funds or resources out of which such payment can be made, it may levy, on all taxable property situated therein, a tax sufficient to pay for said property so taken, not to exceed one-fourth of one mill on the dollar, to be used solely in the district where collected. This shall not prevent the appropriation of said property before payment."

Prior to the State Constitution of 1921, under the Civil Law all property bordering on a navigable stream bore a servitude in favor of the public, requiring the owner to give, without compensation, so much thereof as was reasonably

necessary for levees and public roads. La. Civil Code, Arts. [fol. 324] 707,665 and 457,455. The modification of this rule, as embraced in said Sec. 6 of Art. XVI, was a compromise between elements in the convention, one side contending that full compensation should be paid, while the other insisted that there should be no change. The writer, a member of that convention, was requested by the contending elements to work out an acceptable solution, and the quoted provision was the result. It applies to State action.

There appears to be no exception to the requirement that when the Government in its own right takes private property for public use, it must pay "just compensation". Notwithstanding the servitude of the civil law, just mentioned, lands fronting on a navigable stream and everything on them having value as property belongs to the riparian owner, down to the mean low water line (C. C. 455; 457), and may be used, bought and sold even after the construction of levees, the same as any other private property. Timber, oil, gas and other minerals may be taken therefrom by the owner, subject, of course, to the right of the State to insist that levees, public roads, etc., shall not be interfered with or damaged. It is also well settled that the Government may build levees and other public works in or adjacent to navigable streams in aid of navigation and flood control, the terms and conditions of which are determined by Congress and carried out by the Board of United States Engineers. Until the amendment of the Flood Control Act (Title 33, Secs. 701 et seq., U. S. C.) by the Act of August 18, 1941, to carry out the lower Mississippi River Project, Congress, admittedly, had exacted of the states that they [fol. 325] furnish all rights of way for levees on the main stream of the Mississippi River without cost to the Government. The plaintiff asserts that this amendment "suspends the operation of state law" in reference to the acquisition of rights of way, insofar as "local contributions are concerned", whether taken by the Government directly or through state agencies, such as the Levee Board. However, it seems clear that whether this contention be correct or not, the provisions of the Federal Constitution above quoted required the Government to pay "just compensation" for any property which it took through the exercise of its own

sovereignty, and that no act of Congress could relieve it of that responsibility. The matter comes down, therefore, to the questions of fact and law as to whether the right to destroy the timber existed under either the terms of the original right of way on which the levee stood, and was incidental thereto, or whether what the Levee Board did amounted to an appropriation within the meaning of the State law, vesting in it rights which it could in turn legally transfer to the Government. There is no contention that the right to destroy the timber existed under the original right of way so far as this Court is able to ascertain.

Generally speaking, private ownership of property is still recognized and protected by the law of the land, and those who seek to take or to deprive the owners thereof for public purposes must follow scrupulously the law which permits it to be done. Any other course would lead to serious consequences. This brings us to the point as to whether what was done by the State, through the Levee Board, made it possible to convey an unencumbered title to the Govern-[fol. 326] ment, authorizing it to take or destroy the timber of the plaintiff without paying for it; or the lesser right to pay not more than the assessed value of the property so taken, subject to the condition which, under the State Jurisprudence, makes it necessary that the owner allege and prove the property was assessed at its value as represented thereby for the proceeding year, as a condition precedent to recovery of anything. This requires an analysis, first, of the State law, and secondly, of the facts to determine whether that law was complied with in what the Levee Board did.

This is what took place before the Government began destroying the timber:

Plaintiff acquired this timber through deeds, properly recorded, before the Government or Levee Board took any action looking to the enlargement of the levee or the destruction of the timber.

Act 188 of 1904 provides:

"That standing timber shall remain an immovable, and be subject to all the laws of the State on the subject of immovables, even when separated in ownership from the land

on which it stands, provided that nothing in this act shall be construed as altering, affecting or modifying existing Laws relative to the assessment and taxation of such timber".

On May 16, 1928, the Fifth District Levee Board passed a resolution authorizing its officers and members to sign [fol. 327] "the pledge or guarantee to the United States Government" to carry out the provisions of the Flood Control Act of May 15, 1928, which obligated said Board, among other things, to "(c) provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River" (Exhibit G-1). Thereafter, on June 15, 1929, in carrying out the obligations so assumed, the Levee Board passed another resolution, from which the following is quoted:

"The Fifth Louisiana Levee District by its duly qualified and lawful officials whose signatures are affixed hereto, for and in consideration of the benefits and advantages expected to accrue to said district in particular and to the lands and other property in the alluvial valley of the Mississippi River in general from the carrying out of the plans provided for and made possible by the said Act of Congress approved May 15, 1928, known as the Flood Control Act, hereby agrees and pledges that it will, in general, truly and faithfully perform and execute all obligations and requirements imposed upon said district by any part or parts of said Act of Congress; and specifically that it will truly and faithfully perform and execute requirements (a) and (c), of Section 3 of said Act, namely that said district will:

"(c) Provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River."

With respect to the work undertaken out of which these suits arise, the following communications between the Board and the Army Engineers took place:

[fol. 328] On May 19, 1947, the Federal District Engineers wrote the president of the Levee Board:

"We are in receipt of a letter from Colonel John R. Hardin, District Engineer, New Orleans District, U. S. Engineers, dated May 9 together with project plans of the

proposed enlargement of the Brabston and Ashland Levees south of Vidalia, Louisiana.

"We have examined these plans and it is recommended that your Board concur with Colonel Hardin in enlarging these two low sections of levee in accordance with plans, provided that provisions are made for draining existing gravel road on crown of old levee.";

and on June 10th of the same year, the Engineers addressed another letter to the Levee Board, enclosing plans of the proposed enlargement of the Ashland Levee, and stating:

"It is desired that this District be furnished a formal statement by your Board that rights-of-way are available for the construction of the enlargement and granting the United States a riglit of entry to prosecute the work. This statement may be in the form of a letter signed by the President of the Board.

"You are advised that Brabston Levee, Items A-E, was advertised for construction 6 June; bids to be opened 20 June. Ashland Levee Items A-E will be advertised later this month."

June 12, 1947, the President of the Levee Board replied: [fol. 329] "This is to acknowledge receipt of your letter of June 10th, with the enclosed drawings for Item M-343-R, A-E, Brabston Levee Enlargement and Item M-337-R, A-F, Ashland Levee Enlargement and requesting that you be furnished the formal statement by this Board that rights-of-way are available for the construction and enlargement and granting the United States a right of entry to prosecute the work.

"The Board of Commissioners of the Fifth Louisiana Levee District hereby is glad to comply with your request and render you any assistance possible."

Then follows the crucial document in this case, which reads:

" 'Due to the fact that in emergency levee work delays are at times caused by the necessity of waiting for rights-of-ways until the next regular Board Meeting, Commissioner Yerger offered the motion, seconded by Commissioner Guenard, and unanimously approved, that the President of the Board, Mr. A. T. Shields, be and he is hereby authorized and empowered on behalf of the Board of Com-

missioners, Fifth Louisiana Levee District, to grant rights of way where the need is immediate, the proper right-of-way resolutions to be passed in the regular manner at the following Board meeting.' "

This resolution was passed, according to the certificate of the Secretary of the Levee Board, on September 12, 1945, some two years prior to the beginning of the work in this case.

[fol. 330] This is next quoted (G-7) from the minutes of the Levee Board, the following:

"A letter dated June 10, 1947 was read to the Board from Lt. Colonel Alvin R. Moore, Executive Officer of the New Orleans District, requesting a formal statement from this Board that rights-of-way are available for the construction of the Brabston Levee Enlargement, Item M-343-R, A-E, and the Ashland Levee Enlargement, Item M-337-R. This request was complied with by a letter signed by the President of this Board and dated June 12, 1947, which letter was read to the Board."

The certificate of the Secretary to this document states:

"That the foregoing is a true . . . excerpt from the official records of the minutes of a meeting on July 9, 1947, as the same appears of record on page 222 of the Minute Records of said Board for the period January 22, 1942, through December 1, 1948".

On July 15, 1947, the Engineers wrote the Board as follows:

"'This is to advise that notice to proceed with construction of Item M-343-R, A, B and C, Brabston Levee, Lower Tensas Levee District, Concordia Parish, Louisiana, was issued 10 July 1947 to H. B. Blanks Construction Company, Ferriday, Louisiana, and on Items D and E to Pioneer Contracting Co., Inc., 453 Plum Ave., Memphis, Tenn., on 11 July 1947.

[fol. 331] "according to the terms of the contracts, work must commence under each contract within twenty (20) calendar days after date of receipt of notice to proceed."

It thus appears that a period of approximately two months (May 19th to July 15th) elapsed between the writing

of G-3 by the Engineers informing the Board that it had been decided to enlarge the levees, and requesting that it "concur * * * in enlarging these two low sections of levees in accordance with plans * * *", although the plans were not actually sent to the Board until June 10th, almost a month later. However, the latter it is assumed, was familiar with the location of Brabston and Ashland Levees mentioned in the first letter of May 19th preceding, and the necessity for clearing the adjacent lands for that purpose. Counting from June 10, 1947, when notice was given to the contractors to proceed, the latter had an additional period of twenty days within which to begin work, so that if either the Levee Board or the Engineers had given complainant notice promptly that the work would be done, it no doubt could have come in and removed the timber before it was destroyed. However, the evidence shows that the first knowledge complainant had of the matter was after contractors had begun the destruction.

The Board first requested of the Assessor a list of the property owners in the area where the levees were to be enlarged on June 20, 1947 (G-10). No reply was received, and on July 18, approximately a month later, a second letter was sent to the Assessor, reminding him that he had [fol. 332] not replied to the first (G-11). Finally, under date of July 31, the Assessor, according to copy of his letter, sent "the list of property owners" to the Board. Plaintiff was not included for the reason that its timber acquired from Birdwell September 21, 1946, nor that reserved in the sale to Orrin James on November 15, 1946, had been assessed for that year. However, the owners of the land on which the timber was situated, R. B. Sharp of Sharp and Stricker, and James were so assessed and listed.

Eventually, under date of October 10, 1947, the President of the Levee Board wrote Sharp and Stricker as follows:

"Our inspector, Mr. D. L. Nelson, advises us that you have been previously notified by him that the enlargement work on the Brabston and Ashland levees in Concordia Parish, Louisiana, would soon begin.

"As you of course know, the work on the Brabston enlargement has already started. We are today in receipt of a letter from the Corps of Engineers, New Orleans District,

advising us that notice to proceed with work on Items M-337-R-D&E, Ashland Levee in Concordia Parish, Louisiana, was issued October 7, 1947, to the Atlas Construction Company, Waxahachie, Texas.

"According to the terms of the contract, work must commence within twenty calendar days after the date of receipt by the contractor of notice to proceed.

[fol. 333] "We respectfully request that any buildings, timber or other obstacles which might be within the rights-of-way be removed prior to the time that the contractor begins work.

"For any further detailed information which you might desire I would advise that you contact Mr. E. N. Geddes, Regional Engineer, U. S. Engineers, St. Joseph, Louisiana."

Notice was given "verbally" by D. L. Nelson, an inspector for the Board, to Sharp and James, evidently after receipt of the list of assessed property owners sent with a letter of the Assessor dated July 31, 1947.

The plaintiff was the successor to the Natchez Veneer Company, and acquired the timber on Roseland Plantation with the other property in April, 1943. Some two months later, they also purchased the land in fee because the time for cutting the timber was about to expire. Hence, at the time of selling the land and retaining the timber, plaintiff's title to both land and timber had been merged in a single owner and was subject to assessment as a part of the land.

The above quoted Section 6 of Article XVI of the State Constitution states that the means therein provided for paying for property "used or destroyed for levees or levee drainage purposes * * * shall not prevent the appropriation of said property before payment", and therefore constitutes an exception to the general provisions in Sec. 2 of Art. I of the same Constitution that "private property [fol. 334] shall not be taken or damaged except for public purposes and after just and adequate compensation is paid".

What is meant by the expression "appropriation of said property before payment" as expressed in Sec. 6 of Art. XVI of the State Constitution? In the first place, it was necessary, if there was to be any deviation from the require-

ment of prior payment as provided in Sec. 2 of Art. I, it had to be as was done in said Sec. 6, Art. XVI of the Constitution itself, in order to have equal dignity. This, however, did not absolve the Levee Board from the necessity of following the provisions of the State law as to the manner of taking, appropriating or expropriating private property. These provisions are to be found in Tit. 19, Secs. 1 through 13, of the Revised Statutes of 1950, as copied from the General Statutes of the State. Section 2 of that title provides:

"Where a price cannot be agreed upon with the owner, any of the following may expropriate needed property:

"(1) The state or its political corporations or subdivisions created for the purpose of exercising any state governmental powers; (Emphasis by the writer).

Section 4 declares that such cases shall be tried "without jury"; and Sections 5 through 13 provide, in detail, for notices and service upon the property owners and others, such as how the action shall be put at issue and tried, "in or out of term and with dispatch"; the payment into the Court of the award and its distribution as between the owner, mortgagee or lien creditors. Thus due process or notice, with the opportunity to be heard, are fully preserved.

In this case, the statutory law was not followed, but the Levee Board purported to convey to the United States the [fol. 335] right to "use or destroy" private property without any notice or formal procedure whatever, other than the letters of communication and the resolutions passed some years before and quoted above.

As indicated above, there were and are serious questions as to whether the title to this timber was in condition; by segregation from the land, to be subject to assessment for the preceding year, 1946, since the creating of a separate title thereto did not take place until late in September and November of that year, after the time when, as a matter of common knowledge, assessment rolls are usually made up, if not actually filed. There is also involved the question of whether this was batture, and whether the language of Sec. 6 of Art. XVI of the Constitution "lands and improvements" include timber separately owned, which, by statutory law, is governed by all the rules applicable

to real estate when they are owned separately. (See Act 188 of 1904 quoted above. The decisions holding that growing crops are part of the lands, so declared by the Civil Code, Art. 465, were in cases where the realty was also owned by the same persons.

It is not believed that either the Government or the Levee Board could thus proceed to destroy this timber in the manner which was done, and the course followed can be treated in no other light than a civil trespass, to which both were a party. C. J. Sec. 63, page 923, Verbo Trespass, Sec. 47. The Government, in not having acquired the right to use or destroy the timber as contemplated by the State law, is not relieved from the positive provisions of the United States Constitution declaring that private property shall not be taken without just compensation.

[fol. 336] If the Levee Board was of the view that, for the reasons it now urges, the plaintiff was not entitled to be paid for this timber, or the owner of the soil for so much thereof as was needed to enlarge the levee, it was its duty, after notice to the owners and if unable to agree as to the prices or that the property should not be paid for, under existing laws, to submit the matter to the Court in the manner provided by the State statute and to ask for an adjudication accordingly. Neither it nor the Government could decide these issues themselves without any opportunity to the plaintiff to be heard. Such a course cannot be approved.

Since the Government had no valid title or legal right to destroy the timber, its liability arises under the rule of implied contract where private property is taken for public purposes such as levees, which binds it to pay an adequate value for the timber. This value, it is believed, is reasonably established at the sum of $17.00 per thousand feet for merchantable timber, and $12.00 for that under eighteen inches in diameter and above twelve inches, and, in turn, the defendant, the United States is entitled to recover on the same basis over against the Levee Board since it was obligated to furnish the rights of way and whatever else was necessary for the enlargement of the levee for that purpose.

If the parties cannot agree upon the board measure to be paid for under this ruling, then this Court will undertake to calculate it from the record, but in view of the press of

other matters, an opportunity to fix the total amount due by agreement will be allowed.

[fol. 337] Done and Signed in Chambers, at Monroe, Louisiana, This 11th day of October, 1952.

(S.) Ben C. Dawkins, Judge.

IN UNITED STATES DISTRICT COURT

MOTION OF UNITED STATES FOR A NEW TRIAL—Filed October 22, 1952

Nos. 2536 and 2804.

The defendant, the United States of America, moves that the Order directing the entry of judgment herein be vacated and set aside and that a new trial be granted on the grounds that the Court was manifestly in error in finding that the action of the Levee Board was an expropriation rather than an appropriation, and in applying the rules applicable to expropriation to what was in fact an appropriation.

(S.) Wm. J. Fleniken, United States Attorney, (S.) Mason P. Gilfoil, Assistant United States Attorney, (S.) Sol B. Pressburg, Special Attorney, Department of Justice.

[File endorsement omitted.]

[fol. 338] IN UNITED STATES DISTRICT COURT

MOTION OF THIRD-PARTY DEFENDANT FOR A NEW TRIAL—Filed October 23, 1952

Nos. 2536 and 2804.

The Third-Party Defendant Board of Commissioners for the Fifth Louisiana Levee District, moves that the Order directing the entry of judgment herein be vacated

and set aside and that a new trial be granted on the ground that the Court was manifestly in error in finding:

(1) That the action of said Board of Commissioners was an expropriation rather than an appropriation, and in applying the rules applicable to expropriation to what was in fact an appropriation;

(2) That the manner in which said Board of Commissioners appropriated plaintiff's timber amounts to a "Civil Trespass".

(3) That said Board of Commissioners could be sued in tort for alleged negligence in performance of its governmental functions.

Board of Commissioners for the Fifth Louisiana Levee District, By (S.) Thompson L. Clarke, District Attorney and Legal Advisor.

[File endorsement omitted.]

[fol. 339] IN UNITED STATES DISTRICT COURT

OPINION GRANTING MOTIONS FOR NEW TRIAL—June 4, 1953

Nos. 2536 and 2804

For Plaintiff: Messrs. Fred G. Benton, Louisiana Nat'l Bank Bldg., Baton Rouge, La; Barnett, Barnett & Jones, 414½ E. Capitol Street, Jackson 5, Mississippi; Carl C. Chadwick, Natchez, Mississippi; Jackson B. Davis, 408 Slattery Building, Shreveport, La.

For Defendant: Thompson L. Clarke, St. Joseph, Louisiana; William J. Fleniken.

DAWKINS, J.:

After due consideration of the motions for new trials in the above cases, the Court is of the view that the same should be granted in order to make a further review of the facts and the law therein.

The new trials are, accordingly, granted.

Done and Signed in Chambers, at Monroe, Louisiana, this 3rd day of June, 1953.

(S.) Ben C. Dawkins, Judge.

[File endorsement omitted.]

[fol. 340] IN UNITED STATES DISTRICT COURT

STIPULATION ON NEW TRIAL—Filed September 15, 1953

Nos. 2536 and 2804

It is stipulated by each of the parties hereto through their respective counsel that:

(1) They have no additional evidence to offer upon the new trial granted herein;

(2) Each party hereby resubmits its case to the Court, subject to the presentation of such oral arguments and the filing of such briefs as the Courts direct.

General Box Company, (S.) Fred G. Benton, Louisiana National Bank Bldg., Baton Rouge, Louisiana. (S.) Carl C. Chadwick, Natchez, Mississippi. By (S.) Fred G. Benton, Barnett, Barnett & Jones, [fol. 341] 414½ E. Capitol St., Jackson 5, Mississippi. By (S.) Fred G. Benton. Board of Commissioners, Fifth Louisiana Levee District, (S.) Thompson L. Clarke; United States of America, (T. Fitzhugh Wilson), United States Attorney, (S.) Mason P. Gilfoil, Assistant United States Attornev; (S.) Sol B. Pressburg, Special Attorney, Department of Justice.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PROCEEDINGS HAD ON MOTION FOR NEW TRIAL—Filed September 18, 1953

Nos. 2536 and 2804

Proceedings had in the above entitled action before the Honorable Ben C. Dawkins, Sr., at Monroe, Louisiana, on September 15, 1953.

[fol. 342] The Court:

This case was taken up on the new trial which had previously been granted.

On this day, arguments and the discussions were had by counsel on all sides and the Court indicated to counsel its desire that they either stipulate the quantity and prices of the timber which was destroyed or that they each work out in detail their contention as to the quantity and prices in order that the Court can determine the difference, if any, which it will have to solve. If a stipulation is filed on that score, of course, that necessity will be obviated.

The remaining questions of law involved, such as the one of whether there was an appropriation of the property by the Levee Board within the meaning of the State Law is up for reconsideration, as well as the manner in which the Government took over the premises and purportedly destroyed the timber, in its effect upon the Government's liability regardless of what might have been done by the Levee Board.

Also, the question of whether the amendment to the Flood Control Act of August 18, 1941, applies to this case on the point of the Government being required to pay for the property that was taken for the levee purposes—in this instance being the timber which was destroyed.

Counsel for plaintiff will be allowed thirty days in which to work out with the defendant the question of quantity and [fol. 343] value of the timber, if possible, and if not, to show on behalf of the plaintiff its contention as to what amount of timber and the value of the timber. After this has been done by the plaintiff, counsel for the Government and for the Levee Board will endeavor to do the same, there being no stipulation, and the Court will then, using those contentions on the part of both sides, attempt to fix the quantity and value of the timber to be paid for.

If counsel desire further briefing on either side, then a period of thirty days will be allowed, first to file the brief, and, thereafter, a similar period on behalf of the Government, or a total of sixty days.

Sidney Young, Official Reporter.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

OPINION OF COURT—March 30, 1954

Nos. 2536 and 2804.

For Plaintiff:

Messrs. Fred G. Benton, Louisiana National Bank Bldg., Baton Rouge, La.
Carl C. Chadwick, Natchez, Miss.
Barnett, Barnett & Jones, 414½ E. Capitol Street, Jackson, Miss.
Jackson B. Davis, 408 Slattery Building, Shreveport, Louisiana.

[fol. 344] For Defendant:

T. Fitzhugh Wilson, United States Attorney, Shreveport, La.
Sol B. Pressburg, Alexandria, La.
Thompson L. Clarke, District Attorney, St. Joseph, La.

Dawkins, J.:

A new trial was granted in these cases, and they were subsequently resubmitted on the same record.

On further consideration of the law, the Court is now convinced that while the Fifth District Levee Board was not bound to conform strictly to the provisions of Title 19 Sec. 1-13 of the LSA Revised Statutes dealing with the expropriation of private property, still there had to be action appropriate to the circumstances, in which the land or property owner would be given some notice that he was to be deprived of his property. In cannot be overlooked in these consolidated cases that no formal declaration of appropriation was made at the time the Levee Board attempted to authorize the United States Engineers to proceed. All that had taken place, as pointed out in the original opinion, was an exchange of communications between the Board and the Engineers, of which no property owner had any notice, until the contractor had begun work, and as to this plaintiff, a considerable portion of its timber had been destroyed.

None of the timber was necessary or used in enlarging

[fol. 345] the levee. It was simply wantonly destroyed in a manner which admittedly, substantially lessened the cost of enlarging the levee. When the contractor was appealed to, after much of the timber had already been destroyed by bulldozers, to discontinue and allow the owner to salvage what remained, he asserted, in effect, that his bid had been made on the basis of that method of removing the timber, and declined to allow any interference with his operations.

Undoubtedly the powers of the State and Government in dealing with the construction of levees, as construed by the Courts of both sovereigns, are very broad, especially in Louisiana under the principles of the Civil Law of Riparian Servitudes. Yet, it is impossible for the writer to conceive that they can be exercised solely through private communications between agents of the two governments and the delegation to a single agent, in the case of the Levee Board, of authority to consummate such an appropriation, and still afford due process of law guaranteed by the Federal Constitution.

In Pruyn v. Nelson Bros., et al., 180 La. 760, 157 So. 585, the plaintiff sought an injunction and the recovery of damages for taking soil from the batture on his riparian front located in the Ponchartrain Levee District, to be used in building a levee outside of that District for the protection of the City of Baton Rouge which was in the jurisdiction of said Board. The complainant sought to make the United States a party, but it declined to submit itself to the jurisdiction of the State Court. The District Court refused to grant the injunction and dismissed the suit. This [fol. 346] was affirmed by the Supreme Court of Louisiana, which pointed to the express provision in the Code authorizing the taking of soil, which in that instance was undisputedly batture, for strengthening the levee. No point was made as to the procedure followed, but simply that Pruyn should be paid for the dirt. As stated, batture was excluded from Art. 16 Sec. 6 of the Constitution of 1921 which was the first concession of any compensation for property used or destroyed in connection with levees or highways on navigable streams. In disposing of the matter however, the Court used this significant language:

"This servitude is limited only by the reasonableness of its use, and the administrative officers of the state of Louisiana are charged with determining that limit, subject to review by the Courts only when oppression or injustice is shown and proved. Dubose v. Levee Commissioners; Egan v. Hart, supra; Wolfe v. Hurley (D.C.) 46 F(2d) 515." (Emphasis by the writer)

I am impressed that what was done in the present case amounted to "oppression or injustice". See also Tilden v. United States, 10 F.Supp. 377.

In Danziger et al., v. United States, 93 F. Supp. 70, the Levee Board on August 19, 1947, "passed a resolution appropriating the necessary rights of way for * * * Levee Setback * * * on the main stem of the Mississippi River." On October 8th following, the Board revoked said resolution and passed another slightly different. This was done because of certain correspondence with the State and De-
[fol. 347] partment of Public Works in August of 1947, and it was stated by the Court that what was done had been approved "by all concerned."

The Levee District when set about the physical removal of improvements within the levee right of way, through a contractor and "the United States of America, acting pursuant to the resolution of October 8, 1947, called for sealed bids on the project and awarded construction of the levee" to the successful bidder. The latter "commenced construction in the month of December, 1947, after removal of all improvements from the levee right of way by the Levee District."

The Court found "that the construction was authorized under the Flood Control Act of May 15, 1928, as amended" and that under said Act the district had to agree to maintain "all flood control works after the completion except * * * spillway structures * * *." (33 U.S.C.A. Sec. 702c (a)), and to

"Provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of the Passes. 33 U.S.C.A. Sec. 702c (c).

"Under the Act of Congress of June 15, 1936, as amended

by the Act of August 18, 1941, the Levee District is entitled to reimbursement by the United States for actual expenditures for the project found by the Chief of Engineers to be reasonable in accordance with local legal procedure or custom. 33 U.S.C.A. Sec. 702a—12(d)."

[fol. 348] The Court also cited provisions of the Louisiana Civil Code (Art. 665) that a servitude was imposed upon the property in question in favor of the public for the construction of levees; Art. 16 Sec. 6 of the Constitution of 1921, fixing the basis of payment of property so taken at the assessed value, and said "there is no formal procedure which Levee Districts must follow in appropriating property", again citing Pruyn v. Nelson Bros., supra. However, the Court in the Danziger case called attention to the fact that it was unlike Tilden v. United States, supra, in that in the latter "there was no resolution by the Levee District appropriating the property"; second, as the Act was then written, it provided for the United States to take title to land and then convey it to the local authorities; and finally, that the rights of way in that case had been appropriated by the Levee District, "not by the United States and there was no basis for this action against the United States."

In the present case, the taking or destruction of the timber was by the United States through its contractor, as to which the Levee Board had no part, other than the correspondence with the Army Engineers. I am still of the opinion that the Levee Board should have acted at least through resolution passed as to this particular property, with notice to all record owners, in order that they might be heard. This would not have prevented the work going forward, but it would have permitted the owners to remove the timber, or at least to undertake through negotiations with either the Levee Board or the Government, or perhaps both, for an opportunity to salvage its property. [fol. 349] Any possibility for this hearing, whatever the powers of the Government and the Board might have been, was denied with a consequent substantial loss to plaintiff. It is true that the Board of Engineers called upon the Levee District to furnish rights of way, at least implying

that it was to be done without cost to the United States. However, while this was agreed to in correspondence between the two, as heretofore found, neither the Levee Board nor the Government effectively appropriated even that part of the soil necessary to the project which belonged to persons other than plaintiff. It was the Government which took and destroyed complainant's timber thereby creating, in the absence of acquisition of the legal right to do so the implied obligation, as in contract to pay for what it took and destroyed.

It is my view that the holding heretofore made as to liability was correct and the only remaining question is the value of the timber destroyed.

I believe, however, that the Government should pay the amount to be awarded in this case, for two reasons, (1) its failure to require of the Levee District an effective appropriation, and (2) under Section 702a—12(d) it would be compelled to "reimburse local authorities (the Levee Board) for actual expenditures * * *". After careful study of the question of the fair value of the timber taken and destroyed, I have decided to accept the figures of the defendant's (Government's) counsel as substantially correct, without going into detailed analysis of the evidence, to-wit:

[fol. 350] "A. Excelsior and Home Place.

"The value established for merchantable timber is $17.00 per thousand feet (18" in diameter at 16" from the ground; the value of the timber which would have been merchantable, during the life of plaintiff's contract (under 18" and at least 12" in diameter) is $12.00 per thousand.

"There were 219 acres involved in this tract. Of this 219 acres, 164 acres were timbered, according to Mr. Curry. Applying Mr. Mullins' figure of 2500′ of merchantable timber per acre to this acreage, we find the total volume of timber destroyed to be 410 M, using Doyle Log Scale, at a total value of $6,970.00.

"The timber less than 18" in diameter but at least 12" in diameter was estimated at 15 trees per *acre*. These trees would run from 50′ to 80′ per tree, or an average of 65′ per tree. This would equal approximately 1000′ per

acre, Doyle Log Scale. The total value of this 164 M at $12.00 per M would be $1,968.00.

"Approximately 200 M. board feet was manufactured into lumber. We do not know, from the testimony, whether this came from the timber valued at $17.00 per M or from that valued at $12.00 per M. Using an average value of $14.50 per M. we reach a total value of salvaged timber of $3,190.00.

"Adding the total value of the merchantable timber to that of the timber between 12" and 18" in diameter, we get a total of $8,941.00. Taking from this total the value of [fol. 351] salvaged timber, we arrive at the net damage figure of $5,801.00 for the timber destroyed on this tract.

"B. Roseland Plantation.

"According to plaintiff's witness Mullins, 100 acres of small cottonwood was destroyed on this tract. The Government witness Curry testified that the acreage was 94. Since we have no acre valuations in the transcript, the difference in this testimony is not important.

"The only valuations we have on this property is the Mullins estimate of $5,000.00. This estimate is of the value of the timber at the time of destruction. What value, if any, the timber which could not have been cut at the time of destruction had then we do not know.

"Counsel for defendant submit that the value of the timber destroyed on the two tracts at the time it was destroyed was not in excess of $10,801.00.

There should be judgment for the plaintiff in the sum of $10,801.00. Proper decree should be presented.

Done and Signed in Chambers in Monroe, Louisiana, this 30th day of March, 1954.

(S.) Ben C. Dawkins, Judge.

[File endorsement omitted].

[fol. 352] IN UNITED STATES DISTRICT COURT

JUDGMENT—May 17, 1954

Nos. 2536 and 2804 Consolidated.

This case came on for trial upon the merits after regular assignment; present for the plaintiff: Fred G. Benton, Baton Rouge, Louisiana, Carl C. Chadwick, Natchez, Mississippi, and Barnett, Jones & Montgomery, Jackson, Mississippi; and for the defendant, United States of America, T. Fitzhugh Wilson, United States Attorney, Shreveport, Louisiana, and for the 5th Louisiana Levee District, Thompson L. Clarke; District Attorney of St. Joseph, Louisiana.

When after hearing and considering the evidence offered at the trial and the argument and briefs of the attorneys in the case, the Court believing the law and the evidence to be in favor of the plaintiff and against the defendants, on October 14, 1952 rendered a decision in the case sustaining the plaintiff's claim but holding the case under further consideration for the determination of the damages involved.

On motions filed by the United States of America and the Fifth Louisiana Levee District, the latter made party defendant by cross-complaint filed by the United States, a rehearing was granted on the 3rd day of June, 1953.

After further proceedings, a decision was rendered herein on March 31, 1954 in favor of the plaintiff General Box [fol. 353] Company, and against the defendant, the United States of America, in the principal sum of $19,801.00. The latter opinion eliminated the Fifth District Levee Board.

It Is Ordered, Adjudged And Decreed that there be judgment hereon in favor of the plaintiff, General Box Company, and against the defendant, the United States of America, in the full principal sum of $10,801.00 with interest thereon at the rate of 4% per annum from the date of this judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment, and for all costs actually incurred for witnesses and fees paid to the Clerk of Court.

It Is Further Ordered, Adjudged, And Decreed that as

to the third party defendant, the Fifth Levee District Board of Louisiana, this suit is dismissed.

Judgment Rendered this 17th day of May, 1954, in Chambers at Monroe, Louisiana.

(S.) Ben C. Dawkins, Judge.

[File endorsement omitted].

[fol. 354] In United States District Court

Notice of Appeal Filed by Plaintiff—Filed June 11, 1954

Nos. 2536 and 2804

(Titles of Court and Cases Omitted.)

To the Honorable The United States District Court for the Western District of Louisiana, Monroe Division:

Notice is hereby given that General Box Company, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from that part of the judgment entered in the above actions on May 17th, 1954, wherein plaintiff was awarded interest on the judgment from date of said judgment rather than from date of actual taking on or about November 1, 1947.

Baton Rouge, Louisiana, June 11th, 1954.

(S.) Fred G. Benton, Attorney for General Box and Company, Plaintiff and Appellant.

Address: 114 St. Louis Street, Baton Rouge, Louisiana.

Certificate of Service—(omitted in printing)

[fols. 355-356] [File endorsement omitted.]

Cost Bond on Appeal for $250.00 filed June 11, 1954—(omitted in printing).

[fol. 357] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL FILED BY DEFENDANT—July 16, 1954

Nos. 2536 and 2804.

Notice is hereby given that the United States of America, Defendant in the above named action, hereby appeals to the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana, from the final judgment entered in this action on the 17th day of May, 1954.

(S.) T. Fitzhugh Wilson, United States Attorney,
(S.) Mason P. Gilfoil, Assistant United States Attorney.

CERTIFICATE OF SERVICE (omitted in printing)

[File endorsement omitted.]

[fol. 358] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF THE RECORD ON APPEAL—

Filed August 13, 1954

Nos. 2536 and 2804.

The United States of America, cross-appellant in the above-entitled case, herewith designates for inclusion in the record on appeal the complete record and all the proceedings and evidence in the action.

Respectfully submitted, (S.) T. Fitzhugh Wilson, United States Attorney, Shreveport, Louisiana,
(S.) Mason P. Gilfoil, Assistant United States Attorney, Shreveport, Louisiana.

Certificate

I hereby certify that a copy of the foregoing designation of contents of the record on appeal has this day been mailed to Mr. Fred G. Benton, 114 St. Louis St., Baton Rouge, Louisiana; Mr. Carl A. Chadwick, Natchez, Mississippi;

Messrs. Barnett, Jones & Montgomery, Jackson, Missis-
[fol. 359] sippi and Mr. Thompson L. Clark, St. Joseph, Louisiana.

August 15, 1954:

(S.) Mason P. Gilfoil, Assistant United States Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS UPON APPEAL

[Title omitted]

Now comes the United States of America, appellee and cross-appellant in the above-entitled cause, and states the following as the points upon which it intends to rely as cross-appellant:

[fol. 360] The District Court erred:

1. In finding as a matter of law that the levee board had to follow any prescribed procedure in exercising its riparian servitude.

2. In finding as a fact that the levee board did not appropriate plaintiff's property.

3. In finding as a matter of fact and law that what was done in this case amounted to oppression and injustice.

4. In finding as a matter of fact that the United States took and destroyed plaintiff's property.

5. In awarding plaintiff an amount in excess of the assessed value of its property.

6. In awarding plaintiff any sum whatever.

7. In finding as a matter of law that the United States should pay the amount awarded in this case.

Respectfully submitted, United States of America, By (Signed) T. Fitzhugh Wilson, United States Attorney, Shreveport, Louisiana, by (Signed) William R. Veal, Assistant United States Attorney, Shreveport, Louisiana.

[fol. 361] IN UNITED STATES DISTRICT COURT

MOTION AND ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS —August 16, 1954

Nos. 2536 and 2804.

Comes Now, through undersigned counsel, Defendant herein, and respectfully moves the Court that an order be entered herein authorizing and directing the transmission of all original exhibits filed during the trial of the above cause as a part of the transcript of record to be sent to the United States Circuit Court of Appeals for the Fifth Circuit; said original records being transmitted in lieu of copies thereof in order to avoid the unnecessary expense of making the copies and in order to give the Appellate Court the advantage of having the original documents before the Appellate Court the advantage of having the original documents before it.

Defendant prays for full, general, and equitable relief and all orders appropriate in the premises.

(S.) T. Fitzhugh Wilson, United States Attorney,
(S.) Mason P. Gilfoil, Assistant United States Attorney.

[fol. 362] CERTIFICATE OF SERVICE—(omitted in printing)

ORDER

The Motion for Transmission of the original exhibits having been filed, the Clerk is hereby authorized, impowered and directed to include in the transcript all original exhibits filed here-n by either party hereto as a part hereof.

Shreveport, Louisiana, August 16, 1954.

(S.) Ben C. Dawkins, Jr., U. S. District Judge.

[File endorsement omitted.]

[fol. 363] IN UNITED STATES DISTRICT COURT

MOTION AND ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL—July 21, 1954

[Title omitted]

The United States of America, Appellant, moves the Court for an order extending the time for filing the record on appeal and docketing the appeal herein, in the United States Court of Appeals for the Fifth Circuit so that, as extended, the time will be ninety (90) days from June 11, 1954.

The grounds for the foregoing motion are that appellant has been informed by the Clerk of this Court that it will be impossible to complete the record on appeal within any time substantially less than the period of extension herein requested.

The 19th day of July, 1954,

(S.) T. Fitzhugh Wilson, United States Attorney,

(S.) Mason P. Gilfoil, Assistant United States Attorney.

[fol. 364] ORDER

It Is Ordered, that the time within which to file and docket the record on appeal in the United States Court of Appeals for the Fifth Circuit in the above entitled cause be, and the same is hereby extended so that, as extended, the time will be ninety (90) days from June 11, 1954.

Signed at Shreveport, Louisiana, on this the 21 day of July, 1954.

(S.) Ben C. Dawkins, Jr., United States District Judge.

CERTIFICATE OF SERVICE—(omitted in printing)

[fol. 365] Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 366] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARGUMENT AND SUBMISSION—April 4, 1955

[fol. 367] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15329

UNITED STATES OF AMERICA, Appellant and Appellee,

versus

GENERAL BOX COMPANY, Appellee and Appellant
(and reverse title)

Appeals from the United States District Court for the Western District of Louisiana

OPINION—June 17, 1955

Before Hutcheson, Chief Judge, and Tuttle and Cameron, Circuit Judges

HUTCHESON, Chief Judge: Suing under Sections 1346 and 1402, 28 U.S.C., for the claimed wrongful destruction by the United States, its agents and servants of timber on two tracts of land, appellee, plaintiff below, brought [fol. 368] two separate suits against the United States to recover the damages resulting therefrom. Consolidated by stipulation and order and tried as one suit, there was a judgment for plaintiffs against the United States for $10,801, with interest at four percent from its entry. From that judgment the United States prosecutes an appeal seeking a reversal and rendition, while plaintiff-appellee appeals from so much of it as allows interest not from the injury but from the judgment and fixes it at four instead of five percent.

On its appeal, the United States, specifying many errors, presents four questions [1] for our decision.

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[1] These are: (1) Whether a Louisiana Levee Board correctly exercised a servitude for a right of way to enlarge

Since an affirmative answer to the first two questions will require a reversal of the judgment and will render unnecessary an answer to the last two, and since, for the reasons hereafter stated, we are of the clear opinion that an affirmative answer is required, we will not, in reaching the conclusion that the district judge was in error in his view of the case and the actions he took in it, undertake to decide or discuss the last two questions.

Mindful, as we are, of the thorough consideration the district judge gave to the case, as evidenced by his several [fol. 369] opinions in it,[2] and of his unusual opportunities, as an outstanding and greatly influential member of the Louisiana Constitutional Convention of 1921, and of the Supreme Court of Louisiana, to know and understand the constitution and laws of his native state, we yet find ourselves unable to agree with his conclusions as to the legal effect of the undisputed facts[3] and constrained to hold

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a levee along the Mississippi River and donated it to the United States so that compensation, if any, for standing timber destroyed on the right of way is determined by Louisiana law relative to such a servitude.

(2) Whether under the Louisiana Constitution the timber could be destroyed without compensation to the appellee because (a) the land on which it stood is batture as to which compensation is forbidden, (b) standing timber is not a compensable property when destroyed for levee purposes, or (c) there was no allegation or showing of the assessed value of the timber which is the limit of compensation for property taken or destroyed.

(3) Whether the United States, rather than the Levee Board, took the right of way and, if so, whether the compensation may exceed that allowed by state law.

(4) Whether the Levee Board is bound by state and federal law to pay the compensation awarded.

[2] 94 Fed. Supp. 441; 107 Fed. Supp. 981; 119 Fed. Supp. 749.

[3] The timber destroyed by tractors of the United States in the enlargement of an existing levee on the main stem of the Mississippi River in Louisiana was on land lying between the old levee and the river. The project was

[fol. 379] the law of the case to be contrary to his opinion of it. On the basis of these facts, the United States defended the suit upon several propositions of law, with which we find ourselves in substantial accord.

The first and most important of these is thus stated and argued by it. *The United States is not liable because it received the right of way from the levee board which*

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undertaken pursuant to the provisions of the Federal Flood Control Act of May 15, 1928, 45 Stat. 535, as amended 33 U.S.C., Sec. 702(a) et seq, which provides that the state shall provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River. By Art. 16, Sec. 5 of the 1921 Louisiana Constitution, Boards of Commission of Levee Districts are authorized to cooperate with the government in the construction of such levees and by resolution in 1928 and 1929, the Board of Commissioners of the 5th Louisiana Levee District, the board involved here agreed to provide without cost to the United States all rights of way.

By correspondence commencing May 19, 1947, the district engineer advised the levee board of the proposed enlargement of the levee, submitted the plans and requested a formal statement in the form of a letter signed by the president of the board, that the rights of way were available.

On June 12, 1947, the president of the board acknowledged receipt of the letter and advised the engineer that rights of way were available and the minutes of the board on July 9, 1947, contain an entry that the request of the corps of engineers was complied with by a letter dated June 12, 1947, read to it by the president of the board.

Since Art. 16, Sec. 6 of the 1921 Louisiana Constitution authorizes payment not to exceed the assessed value in the preceding year for land and improvements taken, the secretary of the board wrote to the parish assessor for a list of the property owners within the area. By letter of July 31, 1947, the list was furnished but it did not include the appellee. The owners of the fee in the two tracts were on the assessment list and were notified, but the appellee was not, and did not learn of the work until after the

correctly appropriated it without compensation under a riparian servitude, because:

The property is subject to a riparian servitude for levee purposes, and, under the civil law of Louisiana from ancient times, the owner of property bordering upon a navigable stream has been required to give without compensation so much of it as might be needed for the construction of levees and highways.[4]

While the right to the completely free use of the servitude was changed to some extent by Sec. 6 of Article 16 of the Louisiana Constitution of 1921, which provides "Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes * * shall be paid for at a price not to exceed the assessed value for the preceding year, provided that this shall not apply to batture * * *". As was pointed out in *Mayer v. Board of Commissioners*, 150 So. 295, whatever the section may give to owners of land is in the nature of a gratuity, and contrary to the conclusion of the district judge, the servitude was correctly exercised by the levee board for itself and for the United States.

[fol. 371] The district court mistakenly assumed that the

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destruction of his timber had begun. The destruction was by private contractors employed by the United States under a contract which authorized bulldozing or pushing the trees over and out of the area. It was necessary to remove the trees in order to obtain the type of soil necessary for enlarging the levee. When the contractors were asked by the appellee to discontinue and allow it to cut the remaining timber, the request was refused because the contractors' bid had been made on the basis of bulldozing the standing timber, a less expensive method than removing the stumps after the timber had been cut. The contractors did, however, cooperate with the timber owners to such an extent that a considerable part of the value of the timber was salvaged by them.

[4] Hart v. Bd. of Levee Comm., 54 Fed. 559; Peart v. Meeker, 12 So. 490; Bd. of Comm. v. Franklin, 54 So(2) 125; Eldridge v. Trezevant, 160 U.S. 452; Wolfe v. Hurley, 46 F(2) 515, affirmed 283 U.S. 801; Pruyn v. Nelson Bros., 157 So. 585.

State of Louisiana or its agencies must accord notice and a hearing to exercise the right which it has to appropriate and use a property interest which it owns in the use of the lands for levees, and, on that mistaken assumption, incorrectly held that the property was not effectively appropriated. This was a mistaken view, because the property here was not property taken from another by expropriation but was a public use of a public right already owned and the procedure required for an expropriation of private property was therefore not necessary to the exercise of the servitude already existing.[5] In *Danziger v. United States*, 93 Fed. Supp. 70, the court said, "There is no formal procedure which levee districts must follow in appropriating property", while in *Dickson v. Board of Commissioners*, 26 So(2) 474, it was held that the state has the undoubted right and authority to appropriate such land to a use to which it is subject under its very title. No notice, therefore, was necessary in an appropriation of a right of way for a levee. *Board of Commissioners v. Trouille*, 31 So(2) 799. Moreover notice was given to all persons shown by the tax assessor's rolls to be the owners, and under the settled jurisprudence of Louisiana, no compensation is owed for exercise of this servitude, (1) if the land in question was batture, for Art. 16, Sec. 6 forbids payment for batture used or destroyed for levees, and (2) if it is not batture, the same article restricts compensation to properties which have been assessed.

The district court acknowledged that there existed a question of whether this was batture but did not decide it. [fol. 372] However, this is the standard definition of batture, "The batture is that part of the river bed which is uncovered at the time of low water but is covered annually at the time of ordinary high water. When it ceased to be covered at the time of ordinary high water, it ceases to be batture and becomes the bank of the river." *Boyce v. Bd. of Commissioners*, 107 So. 506; *Ward v. Board of Levee Comm.*, 92 So. 769; 21 Tulane Law Review, 660-661; and Art. 457 of the Louisiana Civil Code provides that "on the borders of the Mississippi and other navigable streams,

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[5] Authorities cited in note 4, supra.

where there are levees, established according to law, the levees shall form the banks", and the undisputed facts show the land on which the timber stood to be batture. The property claimed by the appellee to have been damaged and destroyed was growing on land between the main line levee being enlarged and the river itself, and the evidence is uncontradicted that the entire property was overflowed annually or nearly so.

If, however, the land was not batture, Art. 16, Sec. 6 of the Louisiana Constitution limits recovery for lands and improvements thereon other than batture to a price not to exceed the assessed value for the preceding year. The appellee did not allege or show that either the lands on which the timber stood or the timber itself was assessed for the preceding year and the courts of Louisiana have uniformly held that it is necessary for the plaintiff in a suit for compensation for property used or destroyed for levee purposes to allege that the property was assessed for taxes in the preceding year and to allege that the amount of the assessment was, for that is all that the plaintiff could have a right of action for. *Dickson v. Board of Comm.*, 26 So(2) 474, and cases cited.

[fol. 373] Whatever, then, if the matter were of first impression, might be thought of the correctness of such a view against a view that *the Constitution did not mean to provide that the assessment of the property was essential to the constitutional grant of compensation* but merely intended to set up a measure of the value of the property which could be satisfied, if the property was not assessed, by showing the amount for which other similar property was assessed, the law of Louisiana has been differently and positively declared by its courts, and we must be and are bound by that declaration.

The facts that appellee's timber was owned separately from the land is not, and cannot be, a controlling factor under the law as it was in Louisiana prior to the Constitution or as the Louisiana courts now construe it to be under the amendment.

Finally, the United States urges upon us, and we agree, that *it is not liable under any provision of state or federal law.* It is not liable under state law because state law does

not apply to it. It is not liable under federal law because, taking in right of the state of Louisiana, it succeeds to the rights of the state, and if, as we have seen, no compensation was due from the state, none is due from the United States, which acts in the place of and for the state. *Danziger v. U. S.*, 93 F. Supp. 70; *Pruyn v. Nelson Bros.*, 157 So. 585; *Wolf v. Hurley*, 46 F(2) 515; *U. S. v. Powelson*, 319 U.S. 266.

Further, there is no basis in fact or in law for the claim of the plaintiff that the United States, through its contractors, tortiously destroyed the timber. Plaintiff has [fol. 374] expressly disclaimed suing under the federal tort claims act. It based and bases its claim upon an implied contract to recover for the timber taken, but, if, as we have held, the timber had been already taken by the levee board under its right of appropriation, the United States could not be said to have taken it from the plaintiff under an implied promise to pay for it, and plaintiff's claim on this score must fail too.

We are of the clear opinion that the district judge was wrong in giving judgment against the United States and that the judgment must be reversed and here rendered for it.

Reversed and rendered.

Cameron, Circuit Judge: I dissent.

Cameron, Circuit Judge, Dissenting.

The result attending the reversal of this judgment[1] under the majority opinion is a harsh result. Appellee, General Box Company, owned the record title to the timber on two tracts of land. The timber was valuable, and the Box Company had paid a large sum of money for it. Without warning it was confronted, September 12, 1947, by a number of bulldozers which were engaged in the systematic destruction of portions of that timber. At that time the timber on one of the plantations had been

[1] Appellee, General Box Company, filed two civil actions, one on Nov. 30, 1948 and one on Oct. 19, 1949, but the two were consolidated for trial and have been dealt with throughout as if they constitute one action, and this opinion will refer to them as if they were one civil action.

destroyed, and the timber on the second plantation was [fol. 375] in process of destruction. The contractors refused to cease the destruction of the remainder and permit appellee to go ahead of the bulldozers and remove its timber because their contract gave them the right to remove and destroy the timber. The United States benefitted financially by such destruction of appellee's property.[2] Appellee has never been paid any money for the property so taken by those acting for the United States, and the majority opinion denies it any recovery at all.

Such a result, a court would like to avoid—indeed, would refuse to reach unless inescapably impelled to it by the inexorable requirements of the law as applied to the facts before it. These facts and that law do not, in my opinion, require the reaching of so inequitable a result. The question before the court is this:

Can the United States Government, without just compensation, confiscate and destroy for its own monetary gain, the valuable timber of appellee growing on lands

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[2] The government's brief thus explains this feature: "The appellee was not notified and did not learn of the work until after the destruction of its timber had begun. * * * The destruction was by private contractors employed by the United States. When the contractors were asked by the appellee to discontinue and allow it to cut the timber which remained, the request was refused because the contractors' bid had been made on the basis of bulldozing the standing timber. This was a substantially less expensive method than removing the stumps which appellee's salvaging operations would leave. The contract with the United States authorized pushing the trees over and out of the area. It was necessary to remove the trees in order to obtain the type of soil necessary for enlarging the levee. * * * It was pushed over, and thus destroyed, by bulldozers because the contractors' bid was substantially reduced 'on the basis of that method of removing the timber.' The destruction was, therefore, not unreasonable because * * * 'the Government, just as anyone else, is not required to proceed oblivious to elements of cost'."

of others, basing its right so to do on the claim that the lands are batture; when state authorities have taken no [fol. 376] official action and made no minute entry towards exercising the servitude against the lands or the timber, and have taken no steps at all to that end beyond giving written notice to the land owners (but not to appellee) four months after the confiscation had begun and one month after the destruction of appellee's timber had been completed?

The majority finds itself impaled upon what it conceives to be the stern provisions of the Constitution and statutes of the State of Louisiana as construed by its courts, and feels bound by them to reverse the findings of the court below. I do not feel so bound, partly because I think the majority has misconceived the effect of those decisions; but have the definite idea that we should affirm the holdings of the court below as set forth in the opinions written and published by the district judge.

As pointed out in the majority opinion, the district judge who tried this case below was possessed of unusual qualifications to interpret Louisiana law. His many years of service on the Supreme Court of Louisiana and later as United States District Judge give him those qualifications.[3] He also points out [4] that he was the author of the Louisiana constitutional provisions which lie at the base of the inequity the majority finds itself helpless to avoid.

The district judge dealt with the case below in a very painstaking way, more than three years elapsing between his first and third written opinions in it. In June, 1951 he published a written opinion on motion to dismiss, in which the fundamental rights of the parties are discussed [fol. 377] at some length.[5] He considered, in that opinion,

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[3] As district judge, he had written the opinion in *Tildon v. United States*, 10 F.Supp., and also in *Wolfe v. Hurley*, 46 F. 2d 515, affirmed 283 U. S. 80, which seems to be accepted as a landmark and is relied on extensively by the Government.

[4] 107 F.Supp. at P. 983.

[5] 94 F.Supp. 441.

two cases on which the majority relies,[6] and based his holdings in part upon them. More than a year later, the case was presented on its merits, was thoroughly briefed, and he wrote and published an opinion setting forth the facts in detail, and meeting and deciding all questions of law presented to him then and to us now.[7] He awarded judgment in favor of appellee for $10,801.00. The United States pressed for a new trial, and he granted it a new trial and heard the case again largely on the record of the first hearing. He gave the same thorough conscientious consideration to the facts and the law, and reached the same result as before insofar as the United States was concerned.[8] The opinions are rare examples of clarity and of dogged perseverance by a judge who was not willing to leave an important case until he had gone to the very bottom of all of its factual questions, and had applied his extended knowledge of Louisiana law and procedure to them. Those opinions are adopted as a part of this dissent, and they furnish to my mind a complete answer to the erroneous conclusions of the majority opinion.

What Judge Dawkins has written is better said than I can say it, but his opinions can well be amplified so as to bring into sharper focus the facts to which he applied the law of Louisiana as set forth in its constitution, statutes and decisions, and the pertinent provisions of the federal Constitution.

[fol. 378] Since the chief basis of the majority opinion is that the Levee Board tracked the requirements of Louisiana law, it is well to set out in chronological order just what the record shows with respect to Levee Board action as well as the actions of the United States. May 16, 1928, the Fifth District Levee Board passed a resolution authorizing its officers to pledge to the United States Government that the

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[6] His own opinion in *Tildon v. United States*, 10 F.Supp. 377, and the opinion of the Supreme Court of Louisiana in *Dickson v. Levee Commissioners*, 210 La. 121, 26 So.2d 474.

[7] 107 F.Supp. 981.

[8] 119 F.Supp. 749.

Board would carry out its obligations under the Flood Control Act of 1928.[9]

June 15, 1929, a further resolution was passed by the Levee Board in the same general terms. Sept. 12, 1945, the Levee Board passed a resolution recognizing that emergency action was sometimes required, and granting to the president of the Board authority "to grant rights-of-way where the need is immediate, the proper right-of-way resolution to be passed in the regular manner at the following board meeting".

It ought to be noted that this resolution preceded by almost two years the activities leading to this suit, and that at no time did the Board adjudicate, or has anyone contended, that there was any occasion to proceed under emergency powers.

The acts performed by representatives of the United States and of the Levee Board, the contractors and the appellee, as shown in the record, began May 19, 1947 and ended October 10, 1947. May 19th the United States Engineers wrote the Levee Board transmitting plans for enlarging the levees, requesting concurrence in the determina- [fol. 379] tion to go forward with the work involved in this litigation and requesting a formal statement from the Levee Board that rights-of-way for enlarging the levee were available. June 10th, the engineers repeated that request. June 12th, the president of the Levee Board replied, in part, "The Board of Commissioners of the Fifth Louisiana Levee District hereby is glad to comply with your request and render you any assistance possible."[10] July 9th a resolution was passed by the Levee Board which refers to that letter with apparent approval.[11]

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[9] That Act was changed in material particulars by the Federal Flood Control Act of Aug. 18, 1941, 33 U.S.C.A. 701, et seq. (Cumulative Supp.)

[10] It is doubtful if this communication was adequate to give formal assurance that rights-of-way were available.

[11] See left column 107 F. Supp. 986. This resolution does not exercise any servitude, does not refer to appellee's timber or to any land or property, does not set up any machinery for effecting any expropriation, or provide for any notice to any property owner.

July 15th, the United States Engineers wrote the Levee Board that instructions to begin work had been issued July 10th. Work was begun on one tract July 22 and on the other August 11th.

September 12th, the Box Company learned from outside sources that its timber on the Sharp land was being destroyed. Its then superintendent promptly went to that point and found that a part of the timber on the Sharp place had been destroyed, and immediately set about to salvage what he could of the timber already bulldozed and requested the right to remove that in front of the bulldozer operation. This request was refused. He found that the timber on the Roseland place had already been practically destroyed.

[fol. 380] October 10th, substantially four weeks after this destruction had taken place, and actual notice had been imparted to appellee from outside sources, the president of the Levee Board wrote to the fee owners involved, according to lists he had obtained from the tax assessor, a letter reading in part as follows:

> "We respectfully request that any buildings, timber or other obstacles which might be within the rights of way be removed prior to the time that the contractor begins work."

The letter referred to the fact that the president of the Board was advised that its inspector had previously notified some of the parties. No notice at all had been given to appellee.

That letter of October 10th was written only to the owners appearing on the assessor's rolls. A list of those owners had been requested by letters from the Levee Board dated June 20th and July 31st. Appellee did not appear on the tax roll, and the Government gives good reason therefor, pointing out that appellee became owner of the fee of one tract only on Sept. 21, 1946, and acquired the timber on the Sharp land on April 9, 1947.

It is not perceived that the correspondence between the Levee Board and the United States Engineers can serve to fix or limit the rights of appellee, or to constitute a substitute for corporate action on the part of the Levee Board. It is fundamental that boards of limited jurisdiction such

as the Levee Board can act only through their minutes. The minutes of the Levee Board reflect only four attempts at corporate action which might affect the rights of the par-
[fol. 381] ties to this litigation. None of them referred to appellee's timber or the lands on which it grew and none essayed to exercise or activate any servitude in them. The two resolutions passed respectively in 1928 and 1929 had no reference to any particular land, and served merely to pledge to the United States Government that the Levee Board would carry out generally its obligations under the Flood Control Act. The resolution of September 12, 1945 purported to grant to the president of the Levee Board blanket powers to act in an emergency, subject to confirmation by the Board at the next regular meeting. It could not be contended that the president took any such action respecting the property involved in this suit, and certainly it cannot be said that he granted any right of way to the United States or that the Levee Board ever sanctioned or confirmed any right of way granted by him.

Any support which may be found for the thesis that the levee commissioners essayed to grant to the United States the right to construct levees and destroy appellee's timber, therefore, must rest upon the letter of the president of the Levee Board of June 12, followed by the resolution of the Levee Board of July 9. That letter, as has been pointed out, contained no definite statement that any right of way was available, and made no reference whatever to the timber of appellee or the lands upon which it was growing.

Nor did the resolution of the Levee Board of July 9th make any mention of these lands or of appellee's timber or of any lands or property whatsoever and it did not state
[fol. 382] that any action was taken towards exercising any servitude. It is inconceivable that property rights may be taken away from a citizen by any such indefinite and informal action. It was not possible that Appellee could have gone to the records of the Levee Board and ascertained that any movement was afoot to attempt to divest it of its valuable property rights.

The majority opinion takes the position that no notice was necessary in the appropriation of appellee's property for

levee purposes, and also that notice was actually given to all persons shown by the tax assessor's rolls to be the owners. These two positions will be dealt with in reverse order.

The notice to which the majority opinion refers is a notice given by the president of the Levee Board dated October 10, 1947. It is undisputed that appellee learned from other sources of the destruction of its timber on September 12, and that all of the damage involved in this action had been done prior to the earlier date. Appellee set about with all possible haste to rescue all of its timber which the circumstances would permit as soon as it had notice.

Moreover, the contracts for this work had been let two months prior to September 12th and the engineers knew every detail of the plans when the letter of May 19th was written and forwarded project plans with that letter.[12] Appellee could, without question, have salvaged its timber [fol. 383] if either the Levee Board or the United States had followed the normal dictates of courtesy by passing along the word that destruction of this timber was within contemplation and was actually provided for in the contract. As it turned out, however, it would not have been permitted to salvage timber because the Government had already contracted for its destruction by bulldozers in order to save dollars in letting its contracts. At all events, it is difficult to see how notice given October 10th could possibly avail anything when the property sued on had been destroyed prior to September 12th.

The wording of the notice given to landowners on October 10th is significant and shows that the Levee Board recognized that parties to be affected by levee work should be given a reasonable time to remove their removable property: "We respectfully request that any buildings, timber or other obstacles which might be within the rights of way be removed * * *".

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[12] These plans showed that the timber on appellee's land was to be destroyed in order to lessen the cost to the Government and the Government's brief frankly admits that the contracts "authorized pushing the trees over and out of the way" because "this was a substantially less expensive method".

While the Government's brief argues that no notice to landowners or to appellee of the proposed exercise of the servitude is necessary, the major emphasis placed upon its contention that the notice of October 10th was adequate and that appellee had forfeited the right to notice by not placing its timber upon the assessment roll, justifies the assumption that this is also its point of main reliance.[13] [fol. 384] I have been unable to find any convincing authority to support the conclusion of the majority that, under the law of Louisiana, a servitude may be exercised without any notice whatsoever to property owners. To be sure, the district judge did hold in *Danziger* v. *United States*, 93 F. Supp. 70, that no formal procedure had to be followed in appropriating property to a servitude. That statement is not tantamount to saying that no notice to owners is necessary before removable property rightfully on the land may be destroyed. Moreover, the statement is by a district judge, and is entitled to no more weight than the contrary finding by the court below in this case. Finally, the authority cited in support of that statement by District Judge Wright does not support it. The holding of *Pruyn* v. *Nelson Bros.*, 180 La. 760, 157 So. 585, the case relied on, does not relate to notice or to the machinery by which servitudes are exercised. The sole question on which the Supreme Court of Louisiana was passing when it used the language referred to by Judge Wright, was whether the contractors were removing the

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[13] These excerpts are taken from various points in the Government's brief: "The Board notified the property owners whose names appeared on the assessment roll (R. 331-333; Exhibit G-14). The appellee here was not notified because it was not on the assessment rolls (Exhibit G-12)." * * * "Moreover, as discussed in detail later, notice was given to the persons shown to be the owners by the tax assessment rolls to which the constitutional provision refers." * * * "It was because the ownership of the timber did not appear on the assessment rolls that no notice was given to the appellee (Exhibit G-12)."

dirt from the proper location and were taking the proper amount of dirt and were using it for levee purposes.[14]

Referring to that question the Supreme Court of Louisiana said that:[15]

> "The contractor, Nelson Bros., did not take the soil for personal or for private use, but for the federal government, the State of Louisiana, and the Pont- [fol.385] chartrain Levee Board, which agreed to furnish the necessary soil for construction of the levee, and this was, undoubtedly, for public purposes. *The law does not provide that the administrative officers shall follow any particular procedure in exercising the servitude as in appropriation proceedings.* The customary way is delegate to the contractor the right to remove the soil from the batture. We conclude that the contractor was therefore not a trespasser and had the right under the authority delegated to remove the soil."

A glance at the other authorites cited by the majority opinion will show that none of them sustains the thesis that no notice to property owners is necessary in exercising servitudes. The first of these is *Board of Commissioners* v. *Trouillé*, 31 So. 2d 799. The expropriation there was being conducted under a special act of the Louisiana Legislature, which provided, "That before said right of way is appropriated the exact location thereof shall be determined and made to appear by a *proces verbal* prepared by the Board of State Engineers of Louisiana and filed.

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[14] Examination of syllabus 6, 157 So. 585 discloses that the editor did not construe the language of *Pruyn* v. *Nelson* as having any relation whatever to the mechanics by which Louisiana Levee Boards go about the business of exercising servitudes. The conclusion of law which Judge Wright drew for the *Pruyn* case, "There is no formal procedure which levee districts must follow in appropriating property", was not justified.

[15] 157 So. at p. 588. The crucial language is shown in italics.

in the conveyance records in the office of the clerk and recorder * * *".

The Supreme Court of Louisiana merely decided that there had been a substantial compliance with the requirements of that Act and, inferentially, said that the formal entry of this document was a proper notice. That is certainly no authority for the proposition that the Levee Board and the United States can enter upon a citizen's property and destroy it without any effort to notify any-[fol. 386] body of the purpose to practice such destruction, even though there was ample opportunity to do so.

Dickson v. *Board of Commissioners*, 26 So. 2d 474, does not seem to deal with notice at all. The old case of *Peart, et al* v. *Mecker*, 12 So. 490, contains a good definition of the nature of the servitude attaching to riparian property, but we do not find the matter of notice dealt with at all. This quotation taken from that case[16] is significant:

> "It is undoubtedly the duty of the public officers charged by the state with the execution of its police power, to make no greater sacrifice of private rights than the public welfare demands. In several cases this court has said that power so conferred is not arbitrary, and that the citizen is not without remedy to subject it to judicial control in proper cases."

This language is in line with what the Supreme Court of Louisiana said in *Pruyn* v. *Nelson, supra:* "This servitude is limited only by the reasonableness of its use, and the administrative officers of the State of Louisiana are charged with determining that limit, subject to review by the courts only when oppression or injustice is shown and proved". One of the supporting authorities for the quoted statement is Judge Dawkins' opinion in *Wolfe, et al* v. *Hurley, et al*, 46 F. 2d 515, a landmark in the development of the character and limits of the servitude with which we are dealing.

No authority is found, therefore, for the proposition that the servitude can be exercised against the property [fol. 387] of a citizen without notice to him, and certainly

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[16] 12 So. at page 492.

no authority for such exercise without any action whatever by the Levee Board. It is indicated by the court below in the second opinion that observance of the provisions of Title 19 of the L.S.A., Revised Statutes of Louisiana would be necessary to comply with the requirements of due process of law.[17]

A glance at this L.S.A. Revised Statutes, Title 19, will show a well rounded and complete scheme of "Expropriation", which, incidentally, is the title of this chapter of the Louisiana Code. Section 1 of the chapter states: "As used in this part, the term 'property' means immovable property, including servitudes." That chapter provides for pleadings, notice, trial without jury, and other details of procedure commonly found in the exercise of rights similar to those under consideration.

It is certainly not too much to suggest that the observance of the simple requirements of that chapter would bring these proceedings in line with fundamental concepts of what is right and fair, and would bring it into compliance with procedural due process of law. But it is not necessary to hold the Levee Board to such observance in order to affirm this judgment.

It is difficult to understand the position of the majority in holding that the United States had the right to make this assault upon the property of appellee without affording appellee the slightest chance to protect itself, indeed, while forbidding appellee to undertake such self-protection. It is not sufficient to say that appellee bought the [fol. 388] timber knowing that it was subject to the exercise of servitude. The majority refers to the rights of such a property owner as if they were possessed of no substance at all. Here is the way the court below describes the kind of property right appellee had in its timber:[18]

"Notwithstanding the servitude of the civil law just mentioned, lands fronting on a navigable stream

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[17] 107 F. Supp. at 987.

[18] 107 F. Supp. at 983. This definition of appellee's rights is sustained not only by the statutes referred to but by our decision in *Pittsburg, etc. Co.* v. *Otis, etc. Co.*, 249 Fed. 667, and the Mississippi case citing it, *L. & M. Transfer Co.* v. *Long*, 131 So. 84, 87.

and everything on them having value as property belongs to the riparian owner, down to the mean low water line, L.S.A.—C.C. Articles 455, 457, and may be used, bought and sold even after the construction of levees, the same as any other private property. Timber, oil, gas and other minerals may be taken therefrom by the owner, subject, of course, to the right of the state to insist that levees, public roads, etc., shall not be interfered with or damaged."

What, then, are the rights of the owner of such private property if it be timber, oil, or similar property? If appellee had erected oil derricks under a proper lease, or had constructed oil storage tanks, would it be held that the State of Louisiana or the United States could destroy or confiscate that property without notice or without giving the owner a chance to salvage it? If dwelling houses or places of business such as wharves were used in the legitimate enjoyment of such property rights, could they be similarly destroyed or confiscated? Is timber any different from oil derricks, storage tanks and structures?

The court below pointed out quite accurately that appellee had had no opportunity to have a separate assess-[fol. 389] ment of the timber made,[19] and certainly appellee had been guilty of no such grievous fault as would work a forfeiture of its property. The result would have been the same, however, if the timber had belonged to the owner of the fee whose name appeared on the assessment roll; for the notice to the fee owner was not given until a month after the timber had been destroyed.

It is clear that the court below felt that the actions taken by appellant were repugnant to the just compensation and due process clauses of the Fifth Amendment of the Constitution, and no one would question that the United States was fettered at every stage of the proceed-

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[19] The Government practically concedes this in its brief: "The reason that appellee's timber was not on the assessment roll may have been, as the court (below) suggested because its ownership was not severed from the fee at the time the tax rolls were made up, but that is immaterial under the foregoing rule."

ings by their terms. In dealing with the property of its citizens, the great and powerful government should keep its actions above suspicion of unconstitutionality and as far as possible away from the border line of such a charge.[20]

We need not pause to discuss the requirements of the Fifth Amendment that the United States is not permitted to take private property for public use without just compensation beyond observing that it hardly seems fair that the salutary provisions of the Amendment should be nullified by the indirect method of taking provided for in the [fol. 390] amended Flood Control Act.[21] We pass up further discussion of that clause because it seems so clear that the action of the Government cannot be squared with the due process provisions.

The Government sent its contractors onto this land and began destroying wealth in a manner which can be characterized as nothing but reckless, whether practiced by an individual or by the sovereignty. The trees it set about destroying had economic values which should have been conserved under the most rudimentary concepts of what is fair and right and consistent with husbandry.

The most superficial inquiry would have revealed the owner of this timber because the deeds were of record. The government had taken initial steps to begin the prosecution of this work four months before the date of actual beginning. The only precaution it had taken was to write

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[20] Mr. Justice Holmes well expressed the idea in *Federal Trade Commission* v. *American Tobacco Co.*, 1924, 264 U.S. 298, 307: "We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law".

[21] It is worthy of note that the Amended Act, 33 U.S.C.A. Cumulative Supplement, 702-a-12 provides for reimbursement by the United States of local authorities of reasonable expenditures under local laws and customs; and the government engineer testified that "since 1941 the Federal Government has been paying a fair market value for lands used or destroyed in the carrying out of flood control plans."

a letter to the Levee Board requesting that it be "furnished a formal statement by your board that rights-of-way are available for the construction of the enlargement." If the investigation had been pursued, the government would have found that the Levee Board had not taken any steps or made any minute entries relating to these particular lands or this timber, had not made the first move towards a formal expropriation of the rights of way or the timber on them, and had not notified the property owners that any expropriation was in contemplation, or that any entry upon their lands would ensue.

[fol. 391] The simplest dictates of fairness would have required, in any event, that the Government give the property owners the opportunity to remove things of value from the right of way before their destruction should be begun. If the government had the right to begin destroying timber without notice, it would have had the like right to turn waters upon the lands of these owners without affording opportunity to remove livestock. Whatever muniments of title the Government may have had to the right of way, and whatever assurances it may have possessed with respect to right of entry upon the lands, it had no right whatever to make its entry in such a harsh and ruthless way and with such a wanton disregard of all of the dictates of justice and humanity.

The foregoing considerations are based upon the assumption that the destruction of the trees was inadvertent and innocent. The fact is, however, as conceded by the government, that the destruction was deliberate and was planned from the outset, and such planned destruction was disclosed to the Levee Board when the government engineers forwarded to that Board a set of the plans on May 19th.

The Government could save money by permitting the contractor to push whole trees off of the land it was clearing so that dirt might be obtained for levee purposes, instead of permitting appellee to fell and remove the timber, leaving the stumps to be removed by the contractor. "This was a substantially less expensive method than removing the stumps which appellee's salvaging operation would

[fol. 392] leave."[22] That statement from the government's brief, followed by the assertion "It was pushed over, and thus destroyed, by bulldozers because the contractors' bid was substantially reduced 'on the basis of that method of removing the timber' ", leaves no room to doubt that the Government made its plans and let its contracts on the basis of the destruction; and that is verified by the refusal of the contractors to comply with appellee's request, made as soon as he discovered the depredations, that he be permitted to cut the timber which remained in front of the bulldozers.[23]

But such a course is forbidden by the due process clause of the Fifth Amendment, and what the courts have said in defining its scope and application. Mr. Justice Lamar, speaking for the Supreme Court in a case involving a forced track connection by a railroad,[24] laid down the rule that such an order could not be sustained, "merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable * * * "; and held further that the railroad must not be denied the right to show that "the order was so arbitrary, unjust or unreasonable as to amount to deprivation of property * * * ". And the Supreme Court also held[25] that the Fourteenth Amendment "is concerned with the substance and not with the forms of procedure".

Mr. Justice Brandeis, in his concurring opinion in the *St. Joseph Stockyards* case,[26] first used the term "in-[fol. 393] exorable safeguard" in holding that no step in a proceeding affecting the rights of a citizen shall be taken "except upon due notice and opportunity to be heard". Mr. Justice Cardozo[27] defined due process as "the protection

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[22] See statement from government brief, Note 2, *supra*.

[23] Ib.

[24] *Washington, ex rel v. Fairchild, et al*, 224 U.S. 510, 524.

[25] Missouri, ex rel v. North, et al, 271 U.S. 40, 42.

[26] St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 73.

[27] Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292, 302.

of the individual against arbitrary action", and repeated again that its essence was the observance of "the rudiments of fair play".

That decision was cited by us in our recent case of *City of Meridian* v. *Mississippi Valley Gas Co.*,[28] a case in which we affirmed the action of the lower court in restraining the enforcement of a city ordinance passed without constitutionally adequate notice. We also cited the case of *Morgan* v. *United States* in which the Supreme Court twice[29] reversed administrative proceedings for failure to observe the "fundamental requirements of fairness which are of the essence of due process".

And we have recently, in *Arndt v. United States*,[30] held that government officials must conform their actions to accepted standards of fair play whether those standards are set forth in statutes or regulations or derived from the common acceptation of what is fair in dealings between man and man.

What the government did in the present case is at war with all of those concepts and ought to be rejected by us, whether we base the rejection on the failure of the Levee Board to observe Louisiana law or upon the higher ground [fol. 394] of failure of the United States to observe common standards of justice and fair play. I do not think this court should give its support to such wanton, unjust and unconstitutional actions. I think the judgment of the District Court was right and should be affirmed.

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[28] 214 F. 2d 525, 526 (1954).

[29] 298 U.S. 468 and 304 U.S. 1.

[30] F.2d

[fol. 395] No. 15329

UNITED STATES OF AMERICA

versus

GENERAL BOX COMPANY
(And Reverse Title)

JUDGMENT—June 17, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and here rendered for the United States of America.

"Cameron, Circuit Judge, dissenting."

[fol. 396] IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

(Title omitted)

APPLICATION FOR REHEARING—Filed July 7, 1955

To the Honorable, The United States Court of Appeals for the Fifth Circuit:

The petition of General Box Company, plaintiff-appellee, and cross-appellant, with respect represents:

[fol. 397] 1

That the judgment rendered by this Honorable Court on the 17th day of June, 1955, is erroneous and contrary to the law and evidence, and that a rehearing should be granted for this, to-wit:

2

The errors contained in the majority opinion are pinpointed and clearly developed in the dissenting opinion. These errors are to be amplified hereafter, but for the sake

of brevity are found as to result in this statement which we quote from the majority opinion:

> "Finally, the United States urges upon us, and we agree, that it is not liable under any provision of state or federal law. It is not liable under state law because state law does not apply to it. It is not liable under federal law because, taking in right of the state of Louisiana, it succeeds to the rights of the state, and if, as we have seen, no compensation was due from the state, none is due from the United States, which acts in the place of and for the state. Danziger v. U. S., 93 F. Supp. 70; Pruyn v. Nelson Bros., 157 So. 585; Wolf v. Hurley, 46 F. (2d) 515; U.S. v. Powelson, 319 U.S. 266."

3

Plainly, and beyond question, under the doctrine of *Danziger, supra, Pruyn, supra,* and *Wolf, supra,* and any and all other relevant state cases, if the Levee Board had proceeded directly here in exercising the alleged servitude in the manner in which the government proceeded, and for the same purpose, liability would attach under the state [fol. 398] law, as such action would not have involved the exercise of a riparian servitude in the first place, and would have been in any event classified as unreasonable and unnecessary.

4

Danziger, supra, the most recent of federal authority interpreting the meaning of the riparian servitude in Louisiana only serves to emphasize the correctness of the last statement. In that case while the Court said "there is no formal procedure which Levee Districts must follow in appropriating property" in the exercise of the servitude there the Court did not hold that no procedure and no notice of any kind was required, as is true under the present facts, and actually under the facts of that case the Board of Commissioners of the Pontchartrain Levee District passed a resolution appropriating the specific property for flood control purposes only after a letter had been received from the Department of Public Works advising that the project was to be carried out under the Federal

Control Plan, and thereafter the Levee District sent out notices by registered mail to all property owners of the fact that their land in question had been appropriated for levee purposes, and the Levee Board actually set about the business at its own expense of physically removing all improvements. It was only after these steps were taken that the United States called for sealed bids on the project, and made an award of a construction contract.

5

Here as the government conceded in its brief, and as was emphasized in the dissenting opinion, the appellee was not notified and did not learn of the work until after the de-[fol. 399] struction of its timber had begun by the government's private contractors who, under plans and specifications which had been worked out prior to any action whatever, were authorized to destroy the timber rather than to allow its cutting and removal by appellee or anyone else solely because the United States benefited financially by such direct destruction. Appellee was not even permitted by the contractor to cut and salvage the timber after this discovery was made.

6

To simplify the issue we can concede here that no further action by the Levee Board was required, and still the fact remains that if the State Levee Board through a contractor or otherwise had pursued such a course even after proper resolution and notice any such direct destruction of the timber to save on construction costs would not be the exercise of a riparian servitude under the State law for levee purposes in the first place, and that it would have been classified in any event under the State law as grossly unreasonable and unfair and contrary to every Louisiana case involving a similar issue.

7

In all of the cases beginning with *Dubois v. The Levee Commissioner*, 11 La. 165 and including *Wolf v. Hurley*, 46 F. (2d) 515, the Courts in Louisiana have held as was expressly stated in *Pruyn, supra*, that "this servitude

(speaking of the riparian servitude) is limited only by the reasonableness of its use, and the administrative officers of the State of Louisiana are charged with determining that limit subject to review by the Courts only when oppression or injustice is shown and proved."

[fol. 400]

8

The classification of the land as batture is conceded, but under the facts and for the reasons stated, Section 6 of Article 16 of the Louisiana Constitution of 1921 which forbids payment for batture used or destroyed for levee purposes is manifestly not applicable, as this Article insofar as it applies to batture as well as insofar as it applies to non-batture land subject to the riparian servitude only applies where in the first place the destruction is for "levees" and not merely to save money, and in the second place under it in any event willful and unnecessary destruction is prohibited.

9

In respect to these principles there is no distinction whatever between batture subject to the riparian servitude and non-batture subject to the riparian servitude. The rule as to no payment in one case and a payment of assessed value in the other case only applies where the riparian servitude is being exercised for "levees"—not to "save money", and in any event and even in such cases where it is reasonably and properly exercised.

10

The issue of assessment or non-assessment injected into the case is for these reasons immaterial.

11

The majority opinion apparently proceeds on the assumption that the owner of a batture has no property right of any kind in such ownership entitling him to any protection even as against willful confiscation and unnecessary destruc-
[fol. 401] tion of his interest therein. The correct position as to this is fully developed in the dissenting opinion of Judge Cameron from which we quote the following:

"It is difficult to understand the position of the majority in holding that the United States had the right

to make this assault upon the property of appellee without affording appellee the slightest chance to protect itself, indeed, while forbidding appellee to undertake such self-protection. It is not sufficient to say that appellee bought the timber knowing that it was subject to the exercise of servitude. The majority refers to the rights of such a property owner as if they were possessed of no substance at all. Here is the way the court below describes the kind of property right appellee had in its timber:

> 'Notwithstanding the servitude of the civil law, just mentioned, lands fronting on a navigable stream and everything on them having value as property belongs to the riparian owner, down to the mean low water line, L.S.A.-C.C. Articles 455, 457, and may be used, bought and sold even after the construction of levees, the same as any other private property. Timber, oil, gas and other minerals may be taken therefrom by the owner, subject, of course, to the right of the state to insist that levees, public roads, etc., shall not be interfered with or damaged.'
>
> "What, then, are the rights of the owner of such private property if it be timber, oil, or similar property? If appellee had erected oil derricks under a proper lease, or had constructed oil storage tanks, would it be [fol. 402] held that the State of Louisiana or the United States could destroy or confiscate that property without notice or without giving the owner a chance to salvage it? If dwelling houses or places of business such as wharves were used in the legitimate enjoyment of such property rights, could they be similarly destroyed or confiscated? Is timber any different from oil derricks, storage tanks and structures?"

12

Judge Dawkins' statement as to the right of private ownership in the fee of a batture is fully supported by all of the Louisiana cases summed up in an excerpt which we quote from *Seibert* v. *Conservation Commission of Louisiana*, 159 So. 375, and which reads as follows:

> "It is the well-settled jurisprudence of this state that the contiguous riparian proprietor owns the banks of

the river attached to his property, and this includes the alluvion or batture, and that banks or rivers and/or streams is the land between the ordinary high-water mark and the ordinary low-water mark. What is the ordinary low water mark of the Mississippi River? The levee of the Mississippi River, by statute, is designated as the ordinary high-water mark. State v. Richardson, 140 La. 329, 72 So. 984; Wemple v. Eastham, et al., 150 La. 247, 90 So. 637; Pizanie v. Gauthreaux, 173 La. 737, 138 So. 650; Smith v. Dixie Oil Co., 156 La. 691, 101 So. 24; Boyce Cottonseed Oil Manufacturing Co. v. Board of Commissioners, 160 La. 727, 107 So. 506."

[fol. 403] 13

It is plain therefore that the direct action of the government shown constituted a violation of the Fifth Amendment under circumstances where there is an implied obligation of "just compensation" as herein sought and in respect to which the provisions of the state law including Section 6 of Article 16 of the Louisiana Constitution of 1921 cannot be interpreted as denying the basic and furdamental rights involved.

WHEREFORE, upon the foregoing grounds it is respectfully prayed that a rehearing be granted herein and in due course and after further proceedings that the decree of this Court of June 17, 1955, be avoided and set aside and the decision of the lower Court be reinstated and affirmed subject to the modifications as to interest upon the amount of the award as is sought in the cross-appeal.

Carl C. Chadwick, Natchez, Mississippi; Barnett, Jones & Montgomery, Jackson, Mississippi; Fred G. Benton, Baton Rouge, Louisiana; Attorneys for General Box Company, Appellant and Appellee.

[fol. 404] CERTIFICATE

I hereby certify that a copy of the above and foregoing application for rehearing has this day been mailed, postage prepaid to Perry W. Morton, Assistant Attorney General, T. Fitzhugh Wilson, United States Attorney, Shreveport, Louisiana, and to Roger P. Marquis and S. Billingsley Hill, Attorneys, Department of Justice, Washington, D. C., and

that said application is being filed in good faith and not merely for the purpose of delay.

Baton Rouge, Louisiana, July 5, 1955.

(S.) Fred G. Benton.

[fol. 405] In United States Court of Appeals

[Title omitted]

Order Denying Rehearing—August 5, 1955

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Cameron, Circuit Judge, dissenting."

[fols. 406-409] Motion for and Order Staying Issuance of Mandate—August 16, 1955—(omitted in printing)

[fol. 410] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 411] Supreme Court of the United States

Order Allowing Certiorari—Filed November 7, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 412] GOVERNMENT'S EXHIBIT 1

Rec'd New Orleans River District, N. O., La., May 20, 1929.

Office Board of Commissioners Fifth Louisiana Levee District, May 15th, 1928

On motion of Commissioner Young, seconded by Commissioner Shaw the following resolution was unanimously adopted by the Board of Commissioners, Fifth Louisiana Levee District:

Resolved, That the President of this Board, together with each member constituting the Board of Commissioners, Fifth Louisiana levee District, be and are hereby authorized and directed to sign the pledge, or guarantee to the United States Government, of this Board to carry out the provisions of the Flood Control Act, required under Section Three (3) of the Flood Control Act of May 15, 1928:

And Whereas, the Assurance of the levee Districts, that they maintain all Flood Control Works; and especially, that it will truly and faithfully perform and execute requirements (a) and (c) of Section three (3) of said Act: Namely, that said Fifth Louisiana Levee District, (a) maintain all Flood Control Works after their completion, except controlling and regulating spillways structures, including special relief levees.

(C) Provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River."

I, O. W. Campbell, Secretary of the Board of Commissioners Fifth Louisiana Levee District, do hereby certify that the above resolution was unanimously adopted by the said board at a regular meeting held at its domicile, Tallulah, La., on the 15th day of May 1929;

(S.) O. W. Campbell, Secretary Board of Commissioners, Fifth Louisiana Levee District. (Seal.)

[fol. 413] GOVERNMENT'S EXHIBIT 2

Whereas the Act of Congress approved May 15, 1928, known as the flood control act, provides:

Sec. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

* * * * * * *

And, whereas: The assurance of the levee districts that they will maintain all flood control works after their completion and otherwise comply with paragraphs (a) and (c) of Section 3 of the aforesaid Flood Control Act, shall be evidenced by the signatures of the Commissioners of said levee districts.

Now, therefore, "The Fifth Louisiana Levee District by its duly qualified and lawful officials whose signatures are affixed hereto, for and in consideration of the benefits and advantages expected to accrue to said district in particular and to the lands and other property in the alluvial valley of the Mississippi River in general from the carrying out of the plans provided for and made possible by the said Act of Congress approved May 15, 1928, known as the Flood Control Act, hereby agrees and pledges that it will, in general, truly and faithfully perform and execute all obligations and requirements imposed upon said district by any part or parts of said Act of Congress; and specifically that

it will truly and faithfully perform and execute requirements (a) and (c), of Section 3 of said Act, namely that said district will:"

(a) Maintain all flood control works after their completion except controlling and regulating spillway structures including special relief levees.

(c) Provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River.

In witness whereof, we the officials of said Fifth Louisiana Levee District have hereunto subscribed our names and affixed the official seal of said district this 15th day of June A. D. 1929, at the principal office of said district located at Tallulah, La.

Fifth Louisiana Levee District, by (S.) F. H. Schneider, President, D. B. Flemming, H. F. Gregory, B. F. Young, S. J. Shaw, O. G. Bomer, R. K. Boney, A. E. Kell, Commissioners.

[fol. 414] BOARD OF COMMISSIONERS

Fifth Louisiana Levee District, Tallulah, Louisiana

STATE OF LOUISIANA,
Parish of Madison:

I, Richard K. Boney, Secretary of the Board of Commissioners of the Fifth Louisiana Levee District, do hereby certify that at the regular meeting of the Board of Commissioners of said Board held at its office on the 9th day of April, 1930, the qualified membership of said Board being then composed of the following persons, to wit: F. H. Schneider, O. G. Bomer, A. E. Kell, B. F. Young, S. T. Shaw, D. B. Fleming and R. B. Shields, all of whom, except Commissioner Bomer, were present and participated in the business transacted at said meeting; that the resignation of R. K. Boney, as a member of said Board had been accepted by the Governor of Louisiana on the 4th day of April, 1930. That at said meeting a resolution was adopted unanimously authorizing the signing of the attached document by the

individual Commissioners and that the same are spread upon the minutes of the proceedings of said meeting.

Witness my official signature hereto and the seal of said Board of Commissioners hereto affixed at the office of said Board in Tallulah, Louisiana, this 18th day of April, 1930.

Richard K. Boney, Secretary. (Seal.)

[fol. 415] GOVERNMENT'S EXHIBIT 3

State of Louisiana, Department of Public Works, Baton Rouge

May 19, 1947.

Mr. A. T. Shields, President
Fifth Louisiana Levee District
Tallulah, Louisiana

DEAR MR. SHIELDS:

We are in receipt of a letter from Colonel John R. Hardin, District Engineer, New Orleans District, U. S. Engineers, dated May 9 together with project plans of the proposed enlargement of the Brabston and Ashland Levees south of Vidalia, Louisiana.

We have examined these plans and it is recommended that your Board concur with Colonel Hardin in enlarging these two low sections of levee in accordance with plans, provided that provisions are made for draining existing gravel road on crown of old levee.

Yours very truly, S. C. Smith, District Engineer.

SCS:jow.

cc: The District Engineer, New Orleans District, U. S. Engineer Office, Foot of Pryfania Street, New Orleans, Louisiana.

[fol. 416] GOVERNMENT'S EXHIBIT 4

WAR DEPARTMENT

War Department, Corps of Engineers, Office of the District Engineer, New Orleans District, Foot of Prytania Street, New Orleans 9, Louisiana

10 June 1947.

Board of Commissioners,
Fifth Louisiana Levee District
Tallulah, Louisiana.

GENTLEMEN:

Inclosed are drawings for Item M-343-R, A-E, Brabston Levee Enlargement and Item M-337-R, A-E, Ashland Levee Enlargement, proposed for construction during the coming working season. Plans for the work have been found satisfactory by the Louisiana Department of Public Works.

It is desired that this District be furnished a formal statement by your Board that rights-of-way are available for the construction of the enlargement and granting the United States a right of entry to prosecute the work. This statement may be in the form of a letter signed by the President of the Board.

You are advised that Brabston Levee, Items A-E, was advertised for construction 6 June; bids to be opened 20 June. Ashland Levee Items A-E will be advertised later this month.

Thanking you for your cooperation, I am
For the District Engineer:

Sincerely yours, Alvin R. Moore, Lt. Col., Corps of Engineers, Executive Officer.

2 Incls: 1. Dwgs. File H-8-15903/1-2-3, 2. Dwgs. File H-8-15906/1-2-3.

[fol. 417] GOVERNMENT'S EXHIBIT 5

Office of Board of Commissioners, Fifth Louisiana Levee District, Tallulah, Louisiana

Your File: LMNGL.

June 12, 1947.

Alvin R. Moore,
Lt. Colonel, Corps of Engineers,
Executive Officer,
New Orleans, Louisiana.

DEAR COLONEL MOORE:

This is to acknowledge receipt of your letter of June 10th, with the enclosed drawings for Item M-343-R, A-E, Brabston Levee Enlargement and Item M-337-R, A-E, Ashland Levee Enlargement and requesting that you be furnished the formal statement by this Board that rights-of-way are available for the construction and enlargement and granting the United States a right of entry to prosecute the work.

The Board of Commissioners of the Fifth Louisiana Levee District hereby is glad to comply with your request and render you any assistance possible.

Very truly yours, A. T. Shields, President.

ATS-CK.

[fol. 418] GOVERNMENT'S EXHIBIT 6

"Due to the fact that in emergency levee work delays are at times caused by the necessity of waiting for rights-of-ways until the next regular Board meeting, Commissioner Yerger offered the motion, seconded by Commissioner Guenard, and unanimously approved, that the President of the Board, Mr. A. T. Shields, be and he is hereby authorized and empowered on behalf of the Board of Commissioners, Fifth Louisiana Levee District, to grant rights of way where the need is immediate, the proper right-of-way resolutions to be passed in the regular manner at the following Board meting."

I, Cornelia Kell, Secretary of the Board of Commissioners

for the Fifth Louisiana Levee District, do hereby certify that the foregoing is a true and correct copy of a resolution adopted by said Board at its regular meeting in Tallulah, Louisiana, on September 12, 1945, as the same appears of record on pages 147 and 148 of the Minute Records of said Board for the period January 22, 1942 through December 1, 1948.

In Witness Whereof I have hereunto set my hand and the official seal of my office this 14th day of December, 1949.

(S.) Cornelia Kell, Secretary. (Seal.)

[fol. 419] GOVERNMENT'S EXHIBIT 7

"A letter dated June 10, 1947 was read to the Board from Lt. Colonel Alvin R. Moore, Executive Officer of the New Orleans District, requesting a formal statement from this Board that rights-of-way are available for the construction of the Brabston Levee Enlargement, Item M-343-R, A-E, and the Ashland, Levee Enlargement, Item M-337-R. This request was complied with by letter signed by the President of this Board and dated June 12, 1947, which letter was read to the Board."

I, Cornelia Kell, Secretary of the Board of Commissioners for the Fifth Louisiana Levee District, do hereby certify that the foregoing is a true and correct excerpt from the official records of said Board of its regular meeting in Tallulah, Louisiana, on July 9, 1947, as the same appears of record on 222 of the Minute Records of said Board for the period January 22, 1942 through December 1, 1948.

In Witness Whereof I have hereunto set my hand and the official seal of my office this 14th day of December, 1949.

(S.) Cornelia Kell, Secretary. (Seal.)

[fol. 420] GOVERNMENT'S EXHIBIT 8

War Department, Corps of Engineers, Office of the District Engineer, New Orleans District, Foot of Prytania Street, New Orleans 9, Louisiana

Refer to File No. LMNSS Cont. 1403, Cont. 1406.

15 July, 1947.

Board of Commissioners,
Fifth Louisiana Levee District,
Tallulah, Louisiana.

GENTLEMEN:

This is to advise that notice to proceed with construction of Item M-343-R, A, B and C, Brabston Levee, Lower Tensas Levee District, Concordia Parish, Louisiana, was issued 10 July, 1947 to H. B. Blanks Construction Company, Ferriday, Louisiana, and on Items D and E to Pioneer Contracting Co., Inc., 453 Plum Ave., Memphis, Tenn., on 11 July, 1947.

According to the terms of the contracts, work must commence under each contract within twenty (20) calendar days after date of receipt of notice to proceed.

Sincerely yours, John R. Hardin, Colonel, Corps of Engineers, District Engineer.

[fol. 421] GOVERNMENT'S EXHIBIT 9

War Department, Corps of Engineers, Office of the District Engineer, New Orleans District, Foot of Prytania Street, New Orleans 9, Louisiana

Refer to File No. LMNH 824.3 (Brabston Levee).

7 October, 1947.

Board of Commissioners,
Fifth Louisiana Levee District,
Tallulah, La.

GENTLEMEN:

In reply to your letter dated 2 October, 1947, our contractor has been requested to conduct his operations in such

a manner that timber destruction will be held to a minimum in constructing Brabston Levee. A copy of this letter is attached for your information.

The construction of levees using only impervious materials requires considerable selectivity in the borrow areas and this, in turn, means opening up and operating over a larger than normal area. Every reasonable effort will be made to confine our operations to the smallest area practicable.

Sincerely yours, John R. Hardin, Colonel, Corps of Engineers, District Engineer.

1 Incl.: Copy of letter dated 10-7-47.

[fol. 422] GOVERNMENT'S EXHIBIT 10

June 20, 1947.

Hon. Howard P. Rabb, Assessor,
Concordia Parish,
Vidalia, Louisiana.

DEAR MR. RABB:

Please furnish this office with a list of the property owners within the area from Levee Station 6158/90 to 7038/45 in Concordia Parish within the location of the proposed Ashland and Brabston Levee Enlargements.

I would appreciate receiving this information at the earliest possible date.

Very truly yours, Cornelia Kell, Secretary.

I, Cornelia Kell, Secretary of the Board of Commissioners for the Fifth Louisiana Levee District, hereby certify that the above is a true and correct copy of a letter dated June 20, 1947 written from this office carbon copy of which is on file in this office.

In witness whereof, I have affixed the Seal of said Board and my signature as Secretary thereof.

(S.) Cornelia Kell, Secretary, Board of Commissioners, Fifth Louisiana Levee District, Tallulah, Louisiana. (Seal.)

[fol. 423] GOVERNMENT'S EXHIBIT 11

July 18, 1947.

Hon. Howard P. Rabb, Assessor,
Concordia Parish,
Vidalia, Louisiana.

DEAR MR. RABB:

On June 20th I wrote you with reference to furnishing this office with a list of the property owners within the area from Levee Station 1658/90 to 7038/45 in Concordia Parish within the location of the proposed Ashland and Brabston Levee Enlargements. To date I have had no answers from you and it would be very much appreciated if you would furnish us with this information as soon as possible.

Contracts for the above mentioned work have been let and I would like to notify the property owners of the proposed work without delay.

Assuring you of my appreciation of your cooperation, I am

Very truly yours, Cornelia Kell, Secretary.

I, Cornelia Kell, Secretary of the Board of Commissioners for the Fifth Louisiana Levee District, hereby certify that the above is a true and correct copy of a letter dated July 18, 1947 written from this office carbon copy of which is on file in this office.

In witness whereof, I have affixed the Seal of said Board and my signature as Secretary thereof.

(S.) Cornelia Kell, Secretary, Board of Commissioners, Fifth Louisiana Levee District, Tallulah, Louisiana. (Seal.)

[fol. 424] GOVERNMENT'S EXHIBIT 12

Spokane, La., July 31, 1947.

DEAR MISS KELL:

I am enclosing list of property owners from L. S. 1658/90 to L. S. 7038/45 Brabston and Ashland enlargement.

I got this from the Assessor's Office today.

Very truly yours, (S.) D. L. Nelson.

I, Cornelia Kell, Secretary of the Board of Commissioners for the Fifth Louisiana Levee District, hereby certify that the above is a true and correct copy of a letter dated July 31, 1947 the original of which is on file in this office.

In witness whereof, I have affixed the Seal of said Board and my signature as Secretary thereof.

(S.) Cornelia Kell, Secretary, Board of Commissioners, Fifth Louisiana Levee District, Tallulah, Louisiana. (Seal.)

[fol. 424a] ASSESSOR'S OFFICE, CONCORDIA PARISH, VIDALIA, LOUISIANA

Howard P. Rabb, Assessor

L. D. Dale, Vidalia, La., (Yokey Tract).
Bank of New Roads, New Roads, La.
Orrin James, Waterproof, La.
Orrin James and Frank Whorton, Waterproof, La.
J. M. Jones, Natchez, Miss.
A. B. Learned, Natchez, Miss.
Mrs. Louise Metcalfe, Natchez, Miss.
C. C. Miller, Natchez, Miss.
Floyd L. McCalip, Natchez, Miss.
R. B. Sharp, Natchez, Miss.
R. B. Sharp & R. M. Stricker, Natchez, Miss.
Estate of Mrs. C. L. S. McKitterick, Natchez, Miss.
Mike Burton, Route, Vidalia, La.

I, Cornelia Kell, Secretary of the Board of Commissioners for the Fifth Louisiana Levee District, hereby certify that the above is a true and correct copy of a list from the Asses-

sor's Office, Concordia Parish, Vidalia, Louisiana, the original of which is on file in this office.

In witness whereof, I have affixed the Seal of said Board and my signature as Secretary thereof.

(S.) Cornelia Kell, Secretary, Board of Commissioners, Fifth Louisiana Levee District, Tallulah, Louisiana. (Seal.)

[fol. 425] GOVERNMENT'S EXHIBIT 13

August 4, 1947.

Mr. D. L. Nelson,
Spokane, Louisiana.

DEAR MR. NELSON:

Receipt is acknowledged of the list of property owners within the area of the Ashland and Brabston enlargement.

I am returning a copy of this list to you with the request that you please notify these property owners of this work when you see them on your inspection trips.

Very truly yours, A. T. Shields, President.

ATS:CK. encl. (1).

I, Cornelia Kell, Secretary of the Board of Commissioners for the Fifth Louisiana Levee District, hereby certify that the above is a true and correct copy of a letter dated August 4, 1947 written from this office carbon copy of which is on file in this office.

In witness whereof, I have affixed the Seal of said Board and my signature as Secretary thereof.

(S.) Cornelia Kell, Secretary, Board of Commissioners, Fifth Louisiana Levee District, Tallulah, Louisiana. (Seal.)

Government's Exhibit 17

X613

MISSISSIPPI RIVER
NATCHEZ, MISS.
A.H.P.
Miles above mouth **359.2**

Drainage Area Sq. Mi.

Bankfull Stage Flood Stage

Gage: **CE** Zero= **17.28** Ft. MSL **1929-41** ADJ

High Water MSL Elevation	Year	Highest Day	Highest Stage	Lowest Day	Lowest Stage
61.6	1911	8-12 May	44.3	1 Jan.	7.0
68.7	1912	14,16,17 Apr.	51.42	13-15 Dec.	8.1
69.4	1913	27 Apr.	52.6	17 Sept. ¢	7.0
59.3	1914	25-30 Apr.	42.0	5 Dec.	4.3
61.2	1915	5 Mar.	43.9	19, 20 Nov.	13.4
70.8	1916	15 Feb.	53.5	22 Nov.	6.54
67.2	1917	25-27 Apr.	49.9	25 Dec.	1.6
53.7	1918	8-10 Mar.	36.4	21, 22 Jan.	1.3
63.0	1919	12-14 Apr.	45.73	27-30 Sept.	4.3
67.8	1920	28 Apr.	51.5	28, 29 Oct.	6.8
62.2	1921	10-12 May	44.9	9 Nov.	5.6
72.6	1922	26 Apr.	55.3	17 Nov.	2.8
65.8	1923	14 Apr.	48.5	7, 8 Oct.	9.8
60.7	1924	28 Jan.-2 Feb.	43.45	12-22 Nov.	5.8
51.0	1925	9, 10 Mar.	33.69	19-22 Sept.	1.6
56.3	1926	27 Apr.-2 May	39.0	6, 7 Aug.	7.5
73.9	1927	4 May	56.65	5 Oct.	11.2
65.8	1928	18, 19 Jul.	48.5	23, 24 Oct.	12.4
71.8	1929	5-10 Jun.	54.5	13 Sept.	8.5
61.6	1930	4, 5 Feb.	44.3	14, 15 Nov.	3.2
53.2	1931	31 Dec.	35.9	19 Nov.	2.2
69.8	1932	1,2,4 Mar.	52.51	24 Oct.	5.05
67.7	1933	12 Jun.	50.4	29-Nov.-1 Dec.	4.4
54.9	1934	14, 15 Apr.	37.6	19, 20 Aug.	3.49
67.7	1935	April 21, 22	50.4	22-26 Oct.	4.7
63.4	1936	1-3 May	46.1	2, 3 Sept.	-1.1
75.3	1937	21 Feb.	58.04	22 Dec.	2.20
64.2	1938	26-28 Apr.	46.9	11-13 Nov.	2.9
66.5	1939	31 Mar.-1 Apr.	49.2	2, 3 Nov.	-1.3
57.2	1940	11-13 May	39.9	3 Feb.	-1.65
1924.8	30				

¢ and other dates. # incomplete records.

427

X613

MISSISSIPPI RIVER
NATCHEZ, MISS.
A.H.P.

Miles above Mouth 359.2

Drainage Area Sq. Mi.

Bankfull Stage Flood Stage

Gage: CE Zero= 17.28 Ft. MSL 1929-41 ADJ

Year	Highest		Lowest	
	Day	Stage	Day	Stage
1941	14, 15 Nov.	33.20	20 Aug.	0.71
1942	29 Apr.	41.01	5 Nov.	7.57
1943	13 Jun.	48.58	31 Dec.	1.55
1944	16 May	49.64	1 Jan.	1.45
1945	29, 30 Apr.	55.2	13-16 Sept.	6.7
1946	29 Jan.	45.51	18, 19 Oct.	2.90
1947	8 May	43.4	26 Oct.	1.93
1948	16,17, 18 Apr.	45.55	17 Oct.	1.50
1949	22 Feb.	46.6	3 Dec.	6.00
1950	4 Mar.	53.4	9 Nov.	8.15

50.5
58.3
65.9
66.9
72.5
62.8
60.7
62.8
63.9
70.7 4
635.0
19248
2559.8
63.9 9 5

1941 | 14, 15 Nov. | 33.20 | 20 Aug. | 0.71
1942 | 29 Apr. | 41.01 | 5 Nov. | 7.57
1943 | 13 Jun. | 48.58 | 31 Dec. | 1.55
1944 | 16 May | 49.64 | 1 Jan. | 1.45
1945 | 29, 30 Apr. | 55.2 | 13-16 Sept. | 6.7
1946 | 29 Jan. | 45.51 | 18, 19 Oct. | 2.90
1947 | 8 May | 43.4 | 26 Oct. | 1.93
1948 | 16,17, 18 Apr. | 45.55 | 17 Oct. | 1.50
1949 | 22 Feb. | 46.6 | 3 Dec. | 6.00
1950 | 4 Mar. | 53.4 | 9 Nov. | 8.15

8

& and other dates. # incomplete records.

[fol. 426] GOVERNMENT'S EXHIBIT 14

BOARD OF COMMISSIONERS

FIFTH LOUISIANA LEVEE DISTRICT

Tallulah, Louisiana, October 10, 1947.

Mr. R. B. Sharp and Mr. R. M. Stricker.
Sharp and Stricker
Natchez, Mississippi

GENTLEMEN:

Our inspector, Mr. L. D. Nelson, advises us that you have been previously notified by him that the enlargement work on the Brabston and Ashland levees in Concordia Parish, Louisiana, would soon begin.

As you of course know, the work on the Brabston enlargement has already started. We are today in receipt of a letter from the Corps of Engineers, New Orleans District, advising us that notice to proceed with work on Items M-337-R-D&E, Ashland Levee in Concordia Parish, Louisiana, was issued October 7, 1947, to the Atlas Construction Company, Waxahachie, Texas.

According to the terms of the contract, work must commence within twenty calendar days after the date of receipt by the contractor of notice to proceed.

We respectfully request that any buildings, timber or other obstacles which might be within the rights-of-way be removed prior to the time that the contractor begins work.

For any further detailed information which you might desire I would advise that you contact Mr. F. N. Geddes, Regional Engineer, U. S. Engineers, St. Joseph, Louisiana.

Very truly yours, A. T. Shields, President.

ATS:CK. cc; Mr. D. L. Nelson, Spokane, La.

Government's Exhibit 18

G-18

WAR DEPARTMENT

UNITED STATES ENGINEER OFFICE, VICKSBURG, MISSISSIPPI

Page ..... of .....

Project Mississippi River

Computation High water Elevations - Fitz Island

Computed by ..... Date ..... Checked by ..... Date .....

U. S. GOVERNMENT PRINTING OFFICE 8—10868

Date	MRC H.W. Gage S4	Cut-off Gage Lower Glasscock	Cut-off Gage G-14	MRC HW Gage S3	Ark Hw in Reach		
1927	65.5			65.0	65.2	March	1-6
1937	~~67.8~~ 67.2	68.0	66.5	~~58.8~~	67.2	Feb	24-28
1938	~~59.7~~	57.9	57.0	~~58.7~~	57.5	Apr	28-29
39		59.8	59.1		59.4	Mar	31-Apr 2
40		50.5	49.9		50.2	May	9-14
1941		44.8	43.5		44.2	Nov	14
42		53.0	51.7		52.3	Apr	29-30
43		60.8	59.8		60.3	Mar	17
44		62.0	61.3		61.6		
45		68.0	66.8		67.4		
1946		52.3	51.5		51.9	Apr	9
47	* Estimate	55.5 May			* 57.8		
48		57.3 Apr	56.5		56.9		
49	* Estimate	59.5 Feb	—		* 59.1		
50		65.7 Feb	64.7		65.2		

15 | 873.5
58.3

without 1927.
57.7

* based on Natchez Gage

~~G-18 Circle 35 36 & 37 only~~ All years 19 yrs 1928-50 gage readings were used
58.1

U. S. DISTRICT COURT
Western District of Louisiana
FILED IN EVIDENCE
FEB 6 1952
ALTON L. CURTIS, Clerk
By Irene D'Aquin

2053

WAR DEPARTMENT

UNITED STATES ENGINEER OFFICE, VICKSBURG, MISSISSIPPI

Page ..... of .....

Project .....

Computation .....

Computed by ..... Date ..... Checked by ..... Date .....

U. S. GOVERNMENT PRINTING OFFICE 3—10868

ELEVS MGL

Date	MRC H.W. Gage J4	MRC H.W. Gage J3	Gage G-14	Lower Glasscock	Ark H.W. in Reach	Natchez Stage 0 = 17.2	Natchez H.W. add 8.5' (approx elev) and subtract to compute to approx natchez stage
1927							
July 28	65.5	60			62	56.7	
June 29	57.0	56.4			56.7	48.5	
30		62.9			63.2	54.5	
						44.3	
1931						35.9	
32						52.1	
33	62.5	61.2			61.8	50.4	
34						39.6	
April 35	58.6	57.6		59.3	58.1	50.4	
May 1936			53.6		54.3	46.1	

430

308

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SUPREME COURT OF THE UNITED STATES

No. 383

OCTOBER TERM, 1955

GENERAL BOX COMPANY,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

FRED G. BENTON,
Baton Rouge, La.

CARL C. CHADWICK,
Natchez, Miss.

BARNETT, JONES & MONTGOMERY,
Jackson, Miss.
Attorneys for Plaintiff-Petitioner

Franklin Press, Inc. Baton Rouge, La.

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SUPREME COURT OF THE UNITED STATES

No.

OCTOBER TERM, 1955

GENERAL BOX COMPANY,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the District Court denying the government's motion to dismiss (R. 60-63) is reported at 94 F. Supp. 441. The Court's opinion after the first trial (R. 318-337) is

reported at 107 F. Supp. 981. The final opinion of the Trial Court following a new trial (R. 343-351) is reported at 119 F. Supp. 749. The opinion of the Court of Appeals (R. 367-394) is reported at ____ Fed. (2d) _____.*

JURISDICTION

The original date of the judgment sought to be reversed is June 17, 1955. A petition for rehearing was filed July 7, 1955, within the time provided for by the rules of the United States Court of Appeals, Fifth Circuit (R. 396-404), and the petition was denied (Circuit Judge Cameron dissenting) on August 5, 1955. (R. 405) This court has jurisdiction to consider and grant this petition pursuant to Title 28, USCA Section 1254(1).

QUESTIONS PRESENTED

The question here presented to the Court was stated by Circuit Justice Cameron in a dissenting opinion in the Court below in the following terms:

> "Can the United States Goverment, without just compensation confiscate and destroy for its own monetary gain, the valuable timber of appellee growing on lands of others, basing its right so to do on the claim that the lands are batture; when state authorities have taken no official action and made no minute entry towards exercising the servitude against the lands or the timber, and have taken no steps at all to that end beyond giving written notice to the land owners (but not to appellee) four months after confiscation had begun and one month after the destruction of appellee's timber had been completed?"

* The decision of the Court of Appeals had not been reported as of the time of the printing of this brief.

STATUTES INVOLVED

The pertinent portions of the Flood Control Act of May 15, 1928, as amended, 33 USC, Secs. 702a (12), 702b and 702c, Act 188 of 1904 of the Louisiana Legislature, Article 16, Sections 5 and 6 of the Louisiana Constitution of 1921, and Articles 455 and 665 of the Louisiana Civil Code of 1870 are printed as an appendix, infra, pps. 24-27.

STATEMENT

The General Box Company instituted these two suits in the United States District Court for the Western District of Louisiana, invoking the jurisdiction of that Court under the provisions of the Tucker Act, 28 USC Sections 1346 and 1402, to recover the value of timber destroyed on two tracts of land by contractors of the United States in the enlargement of an existing levee on the main stem of the Mississippi River in Louisiana. The sum of $9,000 was demanded in each case. A total of 260 acres of timber on land lying between the old levee and the river was damaged or destroyed. The cases were consolidated for trial and there was judgment for plaintiffs and against the United States for $10,801 with interest at 4% from its entry. From that judgment the United States appealed to the United States Court of Appeals for the Fifth Circuit. The General Box Company appealed from that part of the judgment allowing it interest from date of judgment instead of from date of injury and from that part of the judgment allowing it interest at four instead of five per cent. The Court of Appeals for the Fifth Circuit, Cameron, Circuit Judge dissenting, reversed the judgment of the Trial Court in favor of General Box Company and rendered judgment in favor of the United States. The material facts out of which this controversy arose are as follows:

The General Box Company acquired this timber through deeds properly recorded before the government or Levee Board took any action toward the enlargement of the levee or the destruction of the timber. Under the provisions of Act 188 of 1904, Louisiana Revised Statutes 9:1103 infra, p. 25, standing timber in Louisiana is classified as an immoval' and is subject to all laws of the State on the subject of immovables, even when separated in ownership from the land on which it stands.

The river enlargement project was undertaken pursuant to the provisions of the Federal Flood Control Act of May 15, 1928, 45 Stat. 535, as amended, 33 USC, Secs. 702 a, et seq. which obligated the Levee Board, among other things to "provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River."

Under Article 16, Section 5 of the 1921 Louisiana Constitution, infra, p. 26, the Board of Commissioners of Levee Districts are authorized to cooperate with the Federal Government in the construction of levees. By resolutions adopted in 1928 and 1929 the Board of Commissioners of the Fifth Louisiana Levee District, which is the Board here involved, agreed to "provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River." (Exhibits G-1, G-2) These two resolutions had no reference to any particular land but served merely to pledge to the United States Government that the Levee Board would carry out its obligations under the Flood Control Act.

With respect to this particular project and this lawsuit the following occurred:

On May 19, 1947, the Army Engineers wrote the President of the Levee Board as follows, (R. 328; Exhibit G-3):

> "We are in receipt of a letter from Colonel John R. Hardin, District Engineer, New Orleans District, U. S. Engineers, dated May 9 together with project plans of the proposed enlargement of the Brabston and Ashland Levees south of Vidalia, Louisiana.
>
> "We have examined these plans and it is recommended that your Board concur with Colonel Hardin in enlarging these two low sections of levee in accordance with plans, provided that provisions are made for draining existing gravel road on crown of old levee."

and on June 10th of the same year, the Engineers enclosed plans of the proposed enlargement and requested that "this District be furnished with a formal statement by your Board that the rights of way are available for the construction of the enlargement and granting the United States a right of entry to prosecute the work." It was said that the "statement may be in the form of a letter signed by the president of the Board." (R. 328; Exhibit G-4)

On June 12, 1947, the president of the Levee Board replied to this letter as follows, (R. 329; Exhibit G-5):

> "This is to acknowledge receipt of your letter of June 10th, with the enclosed drawings for Item M-343-R, A-E, Brabston Levee Enlargement and Item M-337-R, A-F, Ashland Levee Enlargement and requesting that you be furnished the formal statement by this Board that rights-

of-way are available for the construction and enlargement and granting the United States a right of entry to prosecute the work.

"The Board of Commissioners of the Fifth Louisiana Levee District hereby is glad to comply with your request and render you any assistance possible.".

The President of the Levee Board purportedly acted under a resolution passed by the Board on September 12, 1945, some two years prior to the beginning of the work in this case, which reads as follows, (R-329; G-6):

"Due to the fact that in emergency levee work delays are at times caused by the necessity of waiting for rights-of-ways until the next regular Board Meeting, Commissioner Yerger offered the motion, seconded by Commissioner Guenard, and unanimously approved, that the President of the Board, Mr. A. T. Shields, be and he is hereby authorized and empowered on behalf of the Board of Commissioners, Fifth Louisiana Levee District, to grant rights of way where the need is immediate, the proper right-of-way resolutions to be passed in the regular manner at the following Board meeting."

The record does not show that the Levee Board thereafter ever passed a right-of-way resolution. It was shown by an extract from the minutes of a meeting of the Board held on July 9, 1947, that the only action taken with respect to the President's letter was the following, (R. 330; Exhibit G-7):

"A letter dated June 10, 1947 was read to the Board from Lt. Colonel Alvin R. Moore, Executive Officer of the New Orleans District, requesting a formal statement from this Board that rights-of-way are available for the

construction of the Brabston Levee Enlargement, Item M-343-D, A-E, and the Ashland Levee Enlargement, Item M-337-R. This request was complied with by a letter signed by the President of this Board and dated June 12, 1947, which letter was read to the Board."

This minute entry does not purport to show that emergency action was required, does not apply to plaintiff's property, does not set up any machinery for exercising an appropriation, or provide for notice to any property owner.

On July 15, 1947, the Engineers wrote the Board that instructions to begin the work had been issued July 10th. The work was begun on one tract on July 22nd and on the other on August 11th. (Exhibit G-8; R. 279-280)

Under Article 16, Section 6 of the Louisiana Constitution of 1921, infra, page 26, payment is authorized not to exceed the assessed value in the preceding year for lands and improvements, other than batture, taken or destroyed for levee purposes. In order to comply with this provision, the Board requested from the Assessor a list of property owners within the area on June 20, 1947, (G-10). No reply was received, and on July 18, approximately a month later, a second letter was sent to the Assessor reminding him that he had not replied to the first, (G-11). Finally, by letter dated July 31, 1947, the list was furnished, (G-12). Plaintiff was not included on the list for the reason that the title to the timber was not separated from the title to the land until the latter part of 1946 when the assessment rolls had already been made up, and both land and timber had been assessed to the owner of the fee without separate assessment of the timber. The owner of the fee in the two tracts involved, were on the

assessment list and were notified of the levee enlargement, (R-332, 333; Exhibit G-14).

The notices, however, were not sent out until October 10th, several weeks after the destruction of the timber had been completed. The notice read in part as follows, (Exhibit G-11):

> "We respectfully request that any buildings, timber or other obstac s which might be within the rights of way be removed prior to the time that the contractor begins work."

The letter referred to the fact that the President of the Board was advised that its inspector had previously notified some of the parties. No notice at all had been given to petitioner. The belated suggestion that timber could be removed by the owner was not only untimely as shown, but it was impossible in view of the provisions contained in the construction contracts hereafter discussed.

The General Box Company having received no notice whatever, as shown, learned of the project before the notices were sent out after the destruction of its timber had begun. The work had commenced on one of plaintiff's tracts on July 27, 1947 and on the other August 11, 1947, (R. 279-280). The destruction was by private contractors employed by the United States. When the contractors were asked by the General Box Company to discontinue and allow the company to cut the timber which remained, the request was refused because the contracts had been let by specific specifications on the basis of bulldozing the standing timber, (Exhibit P 6-7). The contractors refused to cease the destruction of the remainder and permit the General Box Company to go ahead

of the bulldozers and remove its timber because their contract gave them the right to remove and destroy the timber. The United States benefitted financially from such destruction, as it was shown that **this was a less expensive method than removing stumps which salvaging operations would leave,** (R. 261, 264, 286). Admittedly, that was the only reason the plans of the Government so provided; there is no claim that the method had any peculiar relation to "levee purposes" or flood control in any sense. The area upon which the timber was growing was between the levee and the river. The Government required a place between the levee and the river to obtain dirt for the enlargement. The trees were destroyed and removed for the purpose of creating an area from which the dirt could be obtained. The timber was not used in any way whatever in carrying out the levee enlargement.

The General Box Company instituted these actions against the United States to recover the full value of the timber destroyed by the Government contractors. The United States filed a third party complaint bringing the Levee Board in as a defendant, (R. 64-67; 96-99). It also moved to dismiss the complaints as not stating claims upon which relief could be granted, but this was denied, (R. 55, 60, 94; 94 FS 441).

Following a trial, the District Court held that the United States was liable for the full value of the timber, but could recover over against the Levee Board (R. 318-337; 107 FS 981). On motions for a new trial by the United States and the Levee Board (R. 337-338), further proceedings were had after which the Court held that there had been no effective appropriation by either the Government or the Levee Board; that the Levee Board should have acted at least through a resolution, with notice to all record owners so as to give them

an opportunity to be heard and enter into negotiations for an opportunity to salvage their property; that the destruction of the timber was by the United States through its contractor, thereby creating in the absence of acquisition of the legal right to do so the implied obligation to pay for what it took and destroyed. The trial Court, accordingly, dismissed the suits as to the Levee Board and entered judgment against the United States for the full value of the timber in the sum of Ten Thousand Eight Hundred One Dollars ($10,801), (R. 352, 353). Interest was allowed at four per cent from date of judgment to thirty days after approval of any appropriation act providing for payment. The United States appealed to the Court of Appeals for the Fifth Circuit. The General Box Company appealed from that part of the judgment allowing interest from date of judgment instead of from date of the taking, and from that part of the judgment fixing interest at four per cent instead of five per cent.

The Court of Appeals in an opinion rendered on June 17, 1955 ___ F. 2d ___,* Circuit Judge Cameron dissenting, held that the United States was not liable because it received the right-of-way from the Levee Board which correctly appropriated it without compensation under a riparian servitude; that the United States was not liable under State law because State law does not apply to it; that it was not liable under Federal law because it succeeded to the rights of the State, and if no compensation was due from the State none was due from the United States, which acts in the place of and for the State; that since the timber had already been taken by the Levee Board under its right of appropriation, the United States could not be said to have taken it from the plaintiff under an

* The decision of the Court of Appeals had not been reported as of the time of the printing of this brief.

implied promise to pay for it. (R. 367-394). The General Box Company timely filed an application for rehearing (R. 396-404) which was denied on August 5, 1955, (R. 405).

The present writ is being sought on the ground that the decision of the Court of Appeals is in conflict with the applicable law of the State of Louisiana, and that the Federal questions involved in the case under the Fifth and Fourteenth Amendments have been decided in a way which are in conflict with applicable decisions of the United States Supreme Court.

ARGUMENT

I

THE COURT OF APPEALS' OPINION IS IN CONFLICT WITH THE APPLICABLE LAW OF THE STATE OF LOUISIANA

It must be conceded that under the civil law of Louisiana property bordering upon a navigable stream is subject to a riparian servitude for levee purposes under Articles 455 and 665 of the Louisiana Revised Civil Code, and that there is no formal procedure prescribed which levee districts must follow in order to appropriate such property where this servitude is otherwise properly exercised. *Danziger v. U. S.*, 93 Fed. Supp. 70 (Eastern District of Louisiana, 1950). However, the servitude for making and repairing levees established by Articles 455 and 665 is limited by the reasonableness of its use, and when that limit is exceeded and oppression and injustice to the property owner is shown, the Courts will review such action. *Pruyn v. Nelson Bros.*, 180 La. 760, 157 So. 585 (1934).

The principal ground upon which the Court of Appeals based its opinion was that the Levee Board correctly followed the requirements of Louisiana law in exercising its right of appropriation, and thus the United States could not be said to have taken the plaintiff's property under an implied promise to pay for it. The Court was of the opinion that no notice was necessary in the appropriation of a right of way for a levee and also, that notice was given to all persons shown by the tax assessor's rolls to be the owners.

The majority opinion in this case was erroneous in its conclusion that under the law of Louisiana servitudes for levee purposes may be exercised without notice to the property owners. An analysis of the authorities cited by the majority opinion, show that none of them sustains the proposition that no notice is required, and that, although no formal procedure is prescribed for exercising the right of appropriation, as is required under an expropriation, no greater sacrifice of private rights may be made than the public welfare demands, and the power to appropriate cannot be arbitrarily or capriciously exercised.

The first case cited by the Court in support of the proposition that no notice is required is *Danziger v. U. S.*, 93 Fed. Supp. 70. In that case while the Court said "there is no formal procedure which levee districts must follow in appropriating property" in the exercise of the servitude, the Court did not hold that no procedure and no notice of any kind was required. **Actually in that case the Board of Commissioners passed a resolution to appropriate the specific property involved and notices were sent out by registered mail to all property owners** of the fact that the land in question had been

appropriated for levee purposes, and **the Levee Board actually set about the business of physically removing all improvements at its expense.** It was only after these steps were taken that the United States called for sealed bids and made an award of the contract.

In the present case the petitioner was not notified and did not learn of the work until after the destruction of its timber had begun by the Government contractors under plans and specifications prepared by the Government prior to any action by the Levee Board, and under plans and specifications which specifically authorized destruction of the timber solely because the United States benefited financially from such destruction. Petitioner was not even permitted by the contractor to cut and salvage the timber after this discovery was made.

The next case cited by the majority opinion was *Dickson v. Board of Commissioners*, 210 La. 121, 26 So. (2d) 474, which did not deal with the question of the notice, or the proper procedure to follow in effecting an appropriation. However, the Court did point out that the actions of levee boards are subject to review in cases of palpable abuse of their powers.

In *Board of Commissioners v. Trouille*, 31 So. (2d) 799, which is also relied on in the majority opinion, the appropriation was carried out under an act of the Louisiana legislature which required that before a right-of-way was appropriated "the exact location thereof shall be determined and made to appear by a proces verbal prepared by the Board of State Engineers of the State of Louisiana and filed in the conveyance records." The Court held that there had been a substan-

tial compliance with the provisions of the act with respect to the notice required.

Petitioner respectfully shows that there is no authority for the conclusion of the Court below that this servitude can be exercised against the property of a citizen without notice, and certainly, there is no authority for the exercise of such a servitude without any action whatsoever by the Levee Board.

The Louisiana courts, to the contrary, have held that the power conferred is not arbitrary and that a citizen has a judicial remedy where oppression or injustice is shown.

In *Peart v. Meeker*, 45 La. Ann. 421, 12 So. 490, the Supreme Court of Louisiana said the following:

> "It is undoubtedly the duty of the public officers charged by the State with the execution of its police power to make no greater sacrifice of private rights than public welfare demands. In several cases this court has said the power so conferred is not arbitrary, and that the citizen is not without proper remedy to subject it to judicial control in proper cases."

In *Pruyn v. Nelson*, 180 La. 760, 157 So. 585, the Louisiana Supreme Court said:

> "This servitude is limited only by the reasonableness of its use, and the administrative officers of the State of Louisiana are charged with determining that limit, subject to review by the courts only when oppression or injustice is shown and proved."

See also *DuBose v. Levee Commissioners*, 7 La. Ann. 165; *Egan v. Hart*, 45 La. Ann. 1358; *Wolfe v. Hurley*, 46 Fed. (2d) 515.

The majority of the Court was also of the opinion that notice had been given to all persons shown by the assessment rolls to be owners and that under the settled jurisprudence of Louisiana no compensation was due for the exercise of the servitude, (1) if the land is batture, Art. 16, Sec. 6, Louisiana Constitution forbids payment for batture used or destroyed for levee purposes, and (2) if it is not batture, the same article restricts compensation to properties which have been assessed.

However, the purported notice to which the majority opinion refers, was a notice given by the President of the Levee Board dated October 10, 1947, approximately three months after the work commenced and several weeks after petitioner's timber had been destroyed. It is thus difficult to see how any such notice can be relied upon, particularly in view of the fact that plaintiff was the record owner of the timber and the fact of its assessment or non-assessment is immaterial as will be hereinafter shown.

It is conceded that the land upon which the timber stood should be classified as batture, but Section 6 of Article 16 of the Louisiana Constitution of 1921, which forbids payment for batture used or destroyed for levee purposes, is manifestly not applicable, as this article insofar as it applies to batture, as well as non-batture lands subject to the servitude, only applies where the destruction is for levee purposes, and not merely to save money, and in any event, under this article, arbitrary and capricious action is prohibited, and the land owner has

redress where oppression and injustice is shown. In respect to these principles there is no distinction between batture subject to the riparian servitude and non-batture subject to the riparian servitude. The rule as to no payment in the one case and a payment of assessed value in the other case only applies where the riparian servitude is being exercised for levee purposes, or in any event, only where the servitude is reasonably and properly exercised. For these reasons it is immaterial as to whether or not the property be classified as batture, and the issue of assessment or non-assessment raised by the majority opinion is likewise immaterial.

The majority opinion apparently proceeds on the assumption that the owner of batture has no property right of any kind in such ownership entitling him to any protection even as against willful confiscation and unnecessary destruction of his interest therein. The correct position as to this is fully developed in the dissenting opinion of Judge Cameron from which the following is quoted:

> "It is difficult to understand the position of the majority in holding that the United States had the right to make this assault upon the property of appellee without affording appellee the slightest chance to protect itself, indeed, while forbidding appellee to undertake such self-protection. It is not sufficient to say that appellee bought the timber knowing that it was subject to the exercise of servitude. The majority refers to the rights of such a property owner as if they were possessed of no substance at all. Here is the way the court below describes the kind of property right appellee had in its timber:
>
> > " 'Notwithstanding the servitude of the civil law, just mentioned, lands fronting on a navigable stream and

> everything on them having value as property belongs to the riparian owner, down to the mean low water line. L.S.A.-C.C. Articles 455, 457, and may be used, bought and sold even after the construction of levees, the same as any other private property. Timber, oil, gas and other minerals may be taken therefrom by the owner, subject, of course, to the right of the state to insist that levees, public roads, etc., shall not be interefered with or damaged.'
>
> "What then, are the rights of the owner of such private property if it be timber, oil, or similar property? If appellee had erected oil derricks under a proper lease, or had constructed oil storage tanks, would it be held that the State of Louisiana or the United States could destroy or confiscate that property without notice or without giving the owner a chance to salvage it? If dwelling houses or places of business such as wharves were used in the legitimate enjoyment of such property rights, could they be similarly destroyed or confiscated? Is timber any different from oil derricks, storage tanks and structures?"

This statement as to the property rights of an owner of batture is fully supported by all of the Louisiana cases, summed up in an excerpt which we quote from found in *Seibert v. Conservation Commission of Louisiana*, 159 So. 375, in which the Supreme Court of Louisiana said the following:

> "It is the well-settled jurisprudence of this state that the contiguous riparian proprietor owns the banks of the river attached to his property, and this includes the alluvion or batture, and that the banks or rivers and/or streams is the land between the ordinary high-water mark and the ordinary low-water mark. What is the ordinary low-water mark of the Mississippi River? The levee of the Mississippi River, by statute, is designated

as the ordinary high-water mark. State v. Richardson, 140 La. 329, 72 So. 984; Wemple v. Eastham, et al., 150 La. 247, 90 So. 637; Pizanie v. Gauthreaux, 173 La. 737, 138 So. 650; Smith v. Dixie Oil Co., 156 La. 691, 101 So. 24; Boyce Cottonseed Oil Manufacturing Co. v. Board of Commissioners, 160 La. 727, 107 So. 506."

In view of the foregoing, it is respectfully submitted that the Court of Appeals erred in its application of the law of the State of Louisiana to the facts of this case; that the Levee Board did not properly exercise its right of appropriation; that, therefore, the Government could not derive any rights from the Levee Board upon which it can rely; and, that, the destruction of plaintiff's timber by Government Contractors, pursuant to the plans and specifications prepared by the Government Engineers, and without notice to plaintiff, and without affording to plaintiff an opportunity to salvage the timber, created an implied promise under the Fifth Amendment to pay for the timber so destroyed.

II

THE COURT OF APPEALS DECIDED THE FEDERAL QUESTION INVOLVED IN THIS CASE IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

Circuit Justice Cameron in his dissenting opinion very forcefully and eloquently stated the reasons why the action taken by the Government were contrary to the requirements of the Fifth Amendment. Petitioner quotes the following from his opinion and adopts it as its argument:

"It is clear that the court below felt that the actions taken by appellant were repugnant to the just compen-

sation and due process clause of the Fifth Amendment of the Constitution, and no one would question that the United States was fettered at every stage of the proceedings by their terms. In dealing with the property of its citizens, the great and powerful government should keep its action above suspicion of unconstitutionality and as as far as possible away from the border line of such a charge.[20]

"We need not pause to discuss the requirements of the Fifth Amendment that the United States is not permitted to take private property for public use without just compensation beyond observing that it hardly seems fair that the salutary provisions of the Amendment should be nullified by the indirect method of taking provided for in the amended Flood Control Act.[21] We pass up further discussion of that clause because it seems so clear that the action of the Government cannot be squared with the due process provisions.

"The Government sent its contractors onto this land and began destroying wealth in a manner which can be characterized as nothing but reckless, whether practiced by an individual or by the sovereignty. The trees it set about destroying had economic values which should have been conserved under the most rudimentary concepts of what is fair and right and consistent with husbandry.

"[20] Mr. Justice Holmes well expressed the idea in *Federal Trade Commission v. American Tobacco Co.*, 1924, 264 U.S. 298, 307: 'We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law'."

"[21] It is worthy of note that the Amended Act, 33 U.S.C.A. Cumulative Supplement, 702-a-12 provides for reimbursement by the United States of local authorities of reasonable expenditures under local laws and customs; and the government engineer testified that 'since 1941 the Federal Government has been paying a fair market value for lands used or destroyed in the carrying out of flood control plans.'"

"The most superficial inquiry would have revealed the owner of this timber because the deeds were of record. The government had taken initial steps to begin the prosecution of this work four months before the date of actual beginning. The only precaution it had taken was to write a letter to the Levee Board requesting that it be 'furnished a formal statement by your board that rights-of-way are available for the construction of the enlargement.' If the investigation had been pursued, the government would have found that the Levee Board had not taken any steps or made any minute entries relating to these particular lands or this timber, had not made the first move towards a formal expropriation of the rights of way or the timber on them, and had not notified the property owners that any expropriation was in contemplation, or that any entry upon their lands would ensue.

"The simplest dictates of fairness would have required, in any event, that the Government give the property owners the opportunity to remove things of value from the right of way before their destruction should be begun. If the government had the right to begin destroying timber without notice, it would have had the like right to turn waters upon the lands of these owners without affording opportunity to remove livestock. Whatever muniments of title the Government may have had to the right of way, and whatever assurances it may have possessed with respect to right of entry upon the lands, it had no right whatever to make its entry in such a harsh and ruthless way and with such a wanton disregard of all of the dictates of justice and humanity.

"The foregoing considerations are based upon the assumption that the destruction of the trees was inadvertent and innocent. The fact is, however, as conceded by the government, that the destruction was deliberate and was planned from the outset, and such planned de-

struction was disclosed to the Levee Board when the government engineers forwarded to that Board a set of the plans on May 19th.

"The Government could save money by permitting the contractor to push whole trees off of the land it was clearing so that dirt might be obtained for levee purposes, instead of permitting appellee to fell and remove the timber, leaving the stumps to be removed by the contractor. 'This was a substantially less expensive method than removing the stumps which appellee's salvaging operation would leave.'[22] That statement from the government's brief, followed by the assertion 'It was pushed over, and thus destroyed, by bulldozers because the contractors' bid was substantially reduced "on the basis of that method or removing the timber" ', leaves no room to doubt that the Government made its plans and let its contracts on the basis of the destruction; and that is verified by the refusal of the contractors to comply with appellee's request, made as soon as he discovered the depredations, that he be permitted to cut the timber which remained in front of the bulldozers.[23]

"But such a course is forbidden by the due process clause of the Fifth Amendment, and what the courts have said in defining its scope and application. Mr. Justice Lamar, speaking for the Supreme Court in a case involving a forced track connection by a railroad,[24] laid down the rule that such an order could not be sustained, 'merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable * * *'; and held further that the railroad must not be denied the right to show that

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"[22] See statement from government brief, Note 2, *supra*."

"[23] Ib.".

"[24] *Washington, ex rel v. Fairchild, et al*, 224 U.S. 510, 524."

'the order was so arbitrary, unjust or unreasonable as to amount to deprivation of property * * *'. And the Supreme Court also held[25] that the Fourteenth Amendment 'is concerned with the substance and not with the forms of procedure'.

"Mr. Justice Brandeis, in his concurring opinion in the *St. Joseph Stockyards* case,[26] first used the term 'inexorable safeguard' in holding that no step in a proceeding affecting the rights of a citizen shall be taken 'except upon due notice and opportunity to be heard'. Mr. Justice Cardozo[27] defined due process as 'the protection of the individual against arbitrary action', and repeated again that its essence was the observance of 'the rudiments of fair play'.

"That decision was cited by us in our recent case of *City of Meridian v. Mississippi Valley Gas Co.*,[28] a case in which we affirmed the action of the lower court in restraining the enforcement of a city ordinance passed without constitutionally adequate notice. We also cited the case of *Morgan v. United States* in which the Supreme Court twice[29] reversed administrative proceedings for failure to observe the 'fundamental requirements of fairness which are of the essence of due process'.

"And we have recently, in *Arndt v. United States*,[30] held that government officials must conform their actions to accepted standards of fair play whether those standards are set forth in statutes or regulations or derived from

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"[25] Missouri, ex rel v. North, et al, 271 U.S. 40, 42."
"[26] St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 73."
"[27] Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292, 302."
"[28] 214 F.2d 525, 526 (1954)."
"[29] 298 U.S. 468 and 304 U.S. 1."
"[30] 22 F.2d 484."

the common acceptation of what is fair in dealings between man and man.

"What the government did in the present case is at war with all of those concepts and ought to be rejected by us, whether we base the rejection on the failure of the Levee Board to observe Louisiana law or upon the higher ground of failure of the United States to observe common standards of justice and fair play. I do not think this court should give its support to such wanton, unjust and unconstitutional actions. I think the judgment of the District Court was right and should be affirmed."

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the decision of the Court of Appeals is manifestly erroneous. The issues here presented involve important questions of federal and state law, concerning interests in timber lands along the Mississippi River in Louisiana and other navigable streams of the State of a value of many millions, and this Honorable Court should exercise its discretionary powers to correct the errors herein complained of and reinstate the judgment of the District Court. The petition for certiorari should, therefore, be granted.

Respectfully submitted,

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Baton Rouge, La.

CARL C. CHADWICK,
Natchez, Miss.

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By _____
Fred G. Benton

APPENDIX

The pertinent portions of Section 3 of the Flood Control Act of May 15, 1928, as amended, 33 U.S.C., are contained in Sections 702a-(12), 702b and 702c, as follows:

"§ 702a-12. Same; modified Lower Mississippi River Project as of August 18, 1941 . . . .

"(d) The Chief of Engineers with approval of the Secretary of the Army, shall reimburse local authorities for actual expenditures found by the Chief of Engineers to be reasonable, for providing at the request of the United States, in accordance with local legal procedure or custom, rights-of-way and flowage easements required for future setbacks of main-line Mississippi River levees. . . ."

"§ 702b. Same; local contribution toward cost of flood control work . . . in view of the great expenditure estimated at approximately $292,000,000, prior to May 15, 1928, made by the local interests in the alluvial valley of the Mississippi River for protection against the floods of that River; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required. (May 15, 1928, c 569, § 2, 45 Stat. 535)."

"§ 702c. Same; expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights. Except when

authorized by the Secretary of the Army upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of the Army that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes."

Act 188 of 1904 of the Louisiana Legislature is as follows:

"Providing that standing timber shall remain an immovable, even when separated in ownership from the land on which it stands.

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That standing timber shall remain an immovable, and be subject to all the laws of the State on the subject of immovables, even when separated in ownership from the land on which it stands, provided that nothing in this act shall be construed as altering, affecting or modifying existing laws relative to the assessment and taxation of such timber.

"Section 2. Be it further enacted, etc., That all laws or parts of laws in conflict with this act be, and the same are hereby repealed."

Article 16, Sections 5 and 6 of the 1921 Louisiana Constitution are as follows:

"§ 5. Cooperation with Federal Government.—All governing authorities of districts which have been, or may be created, are authorized to cooperate with the Federal Government in the construction and maintenance of the levees in this State, on such terms and conditions as may be provided by the Federal authorities and accepted by the State authorities."

"§ 6. Compensation for property used or destroyed for levee purposes — Tax levy. — Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes, and for acquiring property within the limits of any duly incorporated municipality of one hundred thousand population or over to be used for constructing new streets or highways where it was necessary to take a previously existing street or highway for levees or levee drainage purposes, shall be paid for at a price not to exceed the assessed value for the preceding year; provided that this shall not apply to batture, nor to property the control of which is vested in the state or any subdivision thereof for the purpose of commerce; and provided, further, that streets and highways within the limits of any duly incorporated municipality of one hundred thousand population or over shall be restored by the governing authorities of the levee district upon the new location so acquired in order to replace any street or highway actually used or destroyed for levees or levee drainage purposes, and such street or highway shall be of a similar type or character as that of the street or highway used or destroyed.

"If the district has no other funds or resources out of which such payment can be made, it may levy, on all taxable property situated therein, a tax sufficient to pay for

said property so taken, and for such streets and highways so relocated and restored, within the limits of any municipality of one hundred thousand population or over not to exceed one-fourth of one mill on the dollar, to be used solely in the district where collected. This shall not prevent the appropriation of said property before payment. [As amended, Acts 1928, No. 165, § 1, adopted, November 6, 1928.]".

Article 455 of the Louisiana Civil Code reads as follows:

"Art. 455. Public things; use of river banks. The use of the banks of navigable rivers or streams is public; accordingly every one has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like.

"Nevertheless, the ownership of the river banks belongs to those who possess the adjacent lands."

Article 665 of the Louisiana Civil Code reads as follows:

"Art. 665. Legal public servitudes. Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.

"All that relates to this kind of servitude is determined by laws or particular regulations."

CERTIFICATE

I, Fred G. Benton, hereby certify that a copy of this petition has been mailed to Solicitor General, Department of Justice, Washington 25, D. C., Perry W. Morton, Assistant Attorney General, T. Fitzhugh Wilson, United States Attorney, Shreveport, Louisiana, and to Roger P. Marquis and S. Billingsley Hill, Attorneys, Department of Justice, Washington, D. C., by first class mail, postage prepaid, this _____ day of _____, 1955.

_____

Fred G. Benton

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 383

GENERAL BOX COMPANY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent

Brief on Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the District Court denying the government's motion to dismiss (R. 30-33) is reported at 94 F. Supp. 441. The Court's opinion after the first trial (R. 229-242) is

reported at 107 F. Supp. 981. The final opinion of the Trial Court following a new trial (R. 246-255) is reported at 119 F. Supp. 749. The opinion of the Court of Appeals (R. 262-284) is reported at 224 Fed. (2d) 7.

JURISDICTION

Federal jurisdiction was invoked in this case under the provisions of 28 U.S.C. 1346. The judgment of the Court of Appeals was entered on June 17, 1955 (224 F. (2d) 7; R. 285). A petition for rehearing was filed July 7, 1955, within the time provided for by the rules of the United States Court of Appeals, Fifth Circuit (R. 285-291), and the petition was denied (Circuit Judge Can on dissenting) on August 5, 1955 (R. 291). The petition for a writ of certiorari was filed on September 12, 1955, and certiorari was granted on November 7, 1955 (R. 291). This court had jurisdiction to consider and grant this petition pursuant to Title 28, USCA Section 1254(1).

QUESTIONS PRESENTED

1. The question here presented to the Court was stated by Circuit Justice Cameron in a dissenting opinion in the Court below in the following terms:

> "Can the United States Government, without just compensation confiscate and destroy for its own monetary gain, the valuable timber of appellee growing on lands of others, basing its right so to do on the claim that the lands are batture; when state authorities have taken no official action and made no minute entry towards exercising the servitude against the lands or the timber, and have taken no steps at all to that end beyond giving

written notice to the land owners (but not to appellee) four months after confiscation had begun and one month after the destruction of appellee's timber had been completed."

2. In the event this Court reverses the judgment of the Court of Appeals an incidental question as to the interest to be allowed on the judgment is presented.

STATUTES INVOLVED

The pertinent portions of the Flood Control Act of May 15, 1928, as amended, 33 U.S.C., Secs. 702a(12), 702b, and 702c, Act 188 of 1904, L.R.S. 9:1903 of the Louisiana Legislature, Article XVI, Sections 5 and 6 of the Louisiana Constitution of 1921, Articles 455 and 665 and 2924 of the Louisiana Civil Code of 1870 are printed as an appendix, infra, pp. 30-34.

STATEMENT

The General Box Company instituted two suits in the United States District Court for the Western District of Louisiana, invoking the jurisdiction of that Court under the provisions of the Tucker Act, 28 U.S.C., Section 1346, to recover the value of timber destroyed on two tracts of land by contractors of the United States in the enlargement of an existing levee on the main stem of the Mississippi River in Louisiana. The sum of $9,000 was demanded in each case. A total of 260 acres of timber on land lying between the old levee and the river was damaged or destroyed. The cases were consolidated for trial.

The material facts out of which this controversy arose are as follows:

The General Box Company acquired this timber through deeds properly recorded before the Government or Levee Board took any action toward the enlargement of the levee or the destruction of the timber. Under the provisions of Act 188 of 1904, Louisiana Revised Statutes 9:1103, infra, p. 31, standing timber in Louisiana is classified as an immovable and is subject to all laws of the State on the subject of immovables, even when separated in ownership from the land on which it stands.

The levee enlargement project was undertaken in 1947 pursuant to the provisions of the Federal Flood Control Act of May 15, 1928, 45 Stat. 535, as amended, 33 U.S.C., Secs. 702a, et seq. which obligated the Levee Board, among other things to "provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River."

Under Article XVI, Section 5 of the 1921 Louisiana Constitution, infra, p. 32, the Board of Commissioners of Levee Districts are authorized to cooperate with the Federal Government in the construction of levees. By resolutions adopted in 1928 and 1929 the Board of Commissioners of the Fifth Louisiana Levee District, which is the Board here involved, agreed to "provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River." (R. 150, 292-293; Exhibits G-1, G-2). These two resolutions had no reference to any particular land but served merely to pledge to the United States Government that the Levee Board would carry out its obligations under the Flood Control Act.

On May 19, 1947, the Department of Public Works of

the State of Louisiana wrote the President of the Levee Board as follows (R. 150, 295; Exhibit G-3):

> "We are in receipt of a letter from Colonel John R. Hardin, District Engineer, New Orleans District, U.S. Engineers, dated May 9 together with project plans of the proposed enlargement of the Brabston and Ashland Levees south of Vidalia, Louisiana.
>
> "We have examined these plans and it is recommended that your Board concur with Colonel Hardin in enlarging these two low sections of levee in accordance with plans, provided that provisions are made for draining existing gravel road on crown of old levee."

and on June 10th of the same year, the Engineers forwarded plans of the proposed enlargement to the Levee Board and requested that "this District be furnished with a formal statement by your Board that the rights of way are available for the construction of the enlargement and granting the United States a right of entry to prosecute the work." It was said that the "statement may be in the form of a letter signed by the president of the Board." (R. 151, 296; Exhibit G-4).

On June 12, 1947, the President of the Levee Board replied to this letter as follows (R. 151, 297; Exhibit G-5):

> "This is to acknowledge receipt of your letter of June 10th, with the enclosed drawings for Item M-343-R, A-E, Brabston Levee Enlargement and Item M-337-R, A-F, Ashland Levee Enlargement and requesting that you be furnished the formal statement by this Board that rights-of-way are available for the construction and enlargement and granting the United States a right of entry to prosecute the work.

"The Board of Commissioners of the Fifth Louisiana Levee District hereby is glad to comply with your request and render you any assistance possible."

The President of the Levee Board purportedly acted under a resolution passed by the Board on September 12, 1945, some two years prior to the beginning of the work in this case, which reads as follows (R. 151, 297; Exhibit G-6):

"Due to the fact that in emergency levee work delays are at times caused by the necessity of waiting for rights-of-way until the next regular Board Meeting, Commissioner Yerger offered the motion, seconded by Commissioner Guenard, and unanimously approved, that the President of the Board, Mr. A. T. Shields, be and he is hereby authorized and empowered on behalf of the Board of Commissioners, Fifth Louisiana Levee District, to grant rights of way where the need is immediate, the proper right-of-way resolutions to be passed in the regular manner at the following Board meeting."

The record does not show that the Levee Board thereafter ever passed a right-of-way resolution. It was shown by an extract from the minutes of a meeting of the Board held on July 9, 1947, that the only action taken with respect to the President's letter was the following (R. 151, 298; Exhibit G-7):

"A letter dated June 10, 1947 was read to the Board from Lt. Colonel Alvin R. Moore, Executive Officer of the New Orleans District, requesting a formal statement from this Board that rights-of-way are available for the construction of the Brabston Levee Enlargement, Item M-343-R, A-E, and the Ashland Levee Enlargement, Item M-337-R. This request was complied with by a letter signed by the

President of this Board and dated June 12, 1947, which letter was read to the Board."

This minute entry does not purport to show that emergency action was required, does not apply to plaintiff's property, does not set up any machinery for exercising an appropriation, or provide for notice to any property owner.

On July 15, 1947, the Engineers wrote the Board that instructions to begin the work had been issued July 10th (R. 151, 299; Exhibit G-8). The work was begun on one of petitioner's tracts on July 22nd and on the other on August 11th (R. 199).

Under Article XVI, Section 6 of the Louisiana Constitution of 1921, infra, p. 32, payment is authorized not to exceed the assessed value in the preceding year for lands and improvements, other than batture, taken or destroyed for levee purposes. In order to comply with this provision, the Board requested from the Assessor a list of property owners within the area on June 20, 1947 (R. 152, 300; Exhibit G-10). No reply was received, and on July 18, approximately a month later, a second letter was sent to the Assessor reminding him that he had not replied to the first (R. 152, 301; Exhibit G-11). Finally, by letter dated July 31, 1947, the list was furnished (R. 152, 302; Exhibit G-12). Plaintiff was not included on the list for the reason that the title to the timber was not separated from the title to the land until the latter part of 1946 when the assessment rolls had already been made up, and both land and timber had been assessed to the owner of the fee without separate assessment of the timber. The owner of the fee in the two tracts involved, was on the assessment list

and was notified of the levee enlargement (R. 152, 304; G-14).

Although the work had commenced in the latter part of July on one tract and in August on the other, the notices, were not sent out until October 10th, several weeks after the destruction of the timber had been completed. The notice read in part as follows (R. 152, 304; Exhibit G-14).

> "We respectfully request that any buildings, timber or other obstacles which might be within the rights of way be removed prior to the time that the contractor begins work."

The letter referred to the fact that the President of the Board was advised that its inspector had previously notified some of the parties. No notice at all had been given to petitioner. The belated suggestion contained in the notice that timber could be removed by the owner was not only untimely as shown, but it was impossible in view of the provisions contained in the construction contracts between the Government and the contractors hereafter discussed.

The General Box Company having received no notice whatever, as shown, learned of the project before the notices were sent out after the destruction of its timber had begun (R. 83). The work had commenced on one of plaintiff's tracts on July 27, 1947, and on the other August 11, 1947 (R. 199). The destruction was by private contractors employed by the United States. When the contractors were asked by the General Box Company to discontinue and allow the company to cut the timber which remained, the request was refused because the contracts had been let by specific specifications on

the basis of bulldozing the standing timber (R. 84; Exhibits P-6, 7; R. 77). The contractors refused to cease the destruction of the remainder and to permit the General Box Company to go ahead of the bulldozers and remove its timber because their contract gave them the right to remove and destroy the timber (R. 84). The United States benefited financially from such destruction, as it was shown that **this was a less expensive method than removing stumps which salvaging operations would leave** (R. 188, 204). Admittedly, that was the only reason the plans of the Government so provided; there is no claim that the method had any peculiar relation to "levee purposes" or flood control in any sense. The area upon which the timber was growing was between the levee and the river. The Government required a place between the levee and the river to obtain dirt for the enlargement. The trees were destroyed and removed for the purpose of creating an area from which the dirt could be obtained. The timber was not used in any way whatever in carrying out the levee enlargement.

The action taken by the Government with respect to petioner's timber is virtually admitted by the United States. On page 4 of the Government's brief in opposition to petition for writ of certiorari, the following statement is made:

> "Thereafter, private contractors employed by the United States commenced clearing the land. Petitioner was not notified and did not learn of the work until after the destruction of its timber had begun. When the contractors were asked by petitioner to discontinue and allow it to cut the timber which remained, the request was refused because the contractors' bids had been made on the basis of bulldozing the standing timber. This was a substantially less expensive method than removing the stumps which petitioner's salvaging operation would leave. Their

contracts with the United States authorized pushing the trees over and out of the area."

The General Box Company instituted these actions against the United States to recover the full value of the timber destroyed by the Government contractors. The United States filed a third party complaint bringing the Levee Board in as a defendant (R. 33, 56). It also moved to dismiss the complaints as not stating claims upon which relief could be granted, but this was denied (R. 27; 54, 30; 94 FS 441).

Following a trial, the District Court held that the United States was liable for the full value of the timber, but could recover over against the the Levee Board (R. 229; 107 FS 981). On motions for a new trial by the United States and the Levee Board (R. 242), further proceedings were had after which the Court held that there had been no effective appropriation by either the Government or the Levee Board; that the Levee Board should have acted at least through a resolution, with notice to all record owners so as to give them an opportunity to be heard and enter into negotiations for an opportunity to salvage their property; that the destruction of the timber was by the United States through is contractor, thereby creating in the absence of acquisition of the legal right to do so the implied obligation to pay for what it took and destroyed (R. 246; 119 FS 749). The Trial Court, accordingly, dismissed the suits as to the Levee Board and entered judgment against the United States for the full value of the timber in the sum of Ten Thousand Eight Hundred One Dollars ($10,801) (R. 256). Interest was allowed at four per cent. from date of judgment to thirty days after approval of any appropriation act providing for payment. The United States appealed to the Court of Appeals for the Fifth Circuit. The

General Box Company appealed from that part of the judgment allowing interest from date of judgment instead of from date of the taking, and from that part of the judgment fixing interest at four per cent instead of five per cent.

The Court of Appeals in an opinion rendered on June 17, 1955 (R. 262; 224 F. (2d) 7), Circuit Judge Cameron dissenting, held that the United States was not liable because it received the right of way from the Levee Board which correctly appropriated it without compensation under a riparian servitude; that the United States was not liable under State law because State law does not apply to it; that it was not liable under Federal law because it succeeded to the rights of the State, and if no compensation was due from the State none was due from the United States, which acts in the place of and for the State; that since the timber had already been taken by the Levee Board under its right of appropriation, the United States could not be said to have taken it from the plaintiff under an implied promise to pay for it. The General Box Company timely filed an application for rehearing (R. 285) which was denied on August 5, 1955 (R. 291).

A petition for certiorari was filed in this Court on September 12, 1955, on the ground that the opinion of the Court of Appeals was in conflict with the applicable law of the State of Louisiana, and that the Federal questions involved in the case under the Fifth and Fourteenth Amendments had been decided in a way which was in conflict with applicable decisions of the United States Supreme Court. Certiorari was granted on November 7, 1955 (R. 291).

SUMMARY OF ARGUMENT

1. Although property bordering upon a navigable stream in Louisiana is subject to a riparian servitude for levee purposes, the servitude, under Louisiana law, is limited by the reasonableness of its use, and the Courts will review the actions of administrative authorities in the exercise of the servitude where oppression and injustice is shown.

2. Due process protects the individual against arbitrary action and requires governmental officials to conform their actions to accepted standards of fair play whether those safeguards are set forth in statutes or regulations or derived from the common acceptations of what is fair in dealings between man and man.

3. Where the government is required to make just compensation for property taken for a public use, interest at the legal rate should be allowed from the date the property is taken.

ARGUMENT

I

THE COURT OF APPEALS' OPINION IS IN CONFLICT WITH THE APPLICABLE LAW OF THE STATE OF LOUISIANA

It must be conceded that under the civil law of Louisiana property bordering upon a navigable stream is subject to a riparian servitude for levee purposes under Articles 455 and 665 of the Louisiana Revised Civil Code, and that there is no formal procedure prescribed under Louisiana law which levee

districts must follow in order to appropriate such property where this servitude is otherwise properly exercised. *Danziger v. U. S.*, 93 Fed. Supp. 70 (Eastern District of Louisiana, 1950). However, the servitude for making and repairing levees established by Articles 455 and 665 is limited by the reasonableness of its use, and when that limit is exceeded and oppression and injustice to the property owner is shown, the Courts will review such action. *Pruyn v. Nelson Bros.*, 180 La. 760, 157 So. 585 (1934).

The principal ground upon which the Court of Appeals based its opinion was that the Levee Board correctly followed the requirements of Louisiana law in exercising its right of appropriation, and thus the United States could not be said to have taken the plaintiff's property under an implied promise to pay for it. The Court was of the opinion that no notice was necessary in the appropriation of a right of way for a levee and also, that notice was given to all persons shown by the tax assessor's rolls to be the owners.

The majority opinion in this case was erroneous in its conclusion that under the law of Louisiana servitudes for levee purposes may be exercised without notice to the property owners. An analysis of the authorities cited by the majority opinion, show that none of them sustains the proposition that no notice is required, and that, although no formal procedure is prescribed for exercising the right of appropriation, as is required under an expropriation, no greater sacrifice of private rights may be made than the public welfare demands, and the power to appropriate cannot be arbitrarily or capriciously exercised.

The first case cited by the Court in support of the propo-

sition that no notice is required is *Danziger v. U. S.*, 93 Fed. Supp. 70. In that case while the Court said "there is no formal procedure which levee districts must follow in appropriating property" in the exercise of the servitude, the Court did not hold that no procedure and no notice of any kind was required. **Actually in that case the Board of Commissioners passed a resolution to appropriate the specific property involved and notices were sent out by registered mail to all property owners** of the fact that the land in question had been appropriated for levee purposes, and **the Levee Board actually set about the business of physically removing all improvements at its expense.** It was only after these steps were taken that the United States called for sealed bids and made an award of the contract.

In the present case the petitioner was not notified and did not learn of the work until after the destruction of its timber had begun by the Government contractors under plans and specifications prepared by the Government prior to any action by the Levee Board, and under plans and specifications which specifically authorized destruction of the timber solely because the United States benefited financially from such destruction. Petitioner was not even permitted by the contractor to cut and salvage the timber after this discovery was made.

The next case cited by the majority opinion was *Dickson v. Board of Commissioners*, 210 La. 121, 26 So. (2d) 474, which did not deal with the question of notice, or the proper procedure to follow in effecting an appropriation. However, the Court did point out that the actions of levee boards are subject to review in cases of palpable abuse of their powers.

In *Board of Commissioners v. Trouille*, 31 So. (2d) 799, which is also relied on in the majority opinion, the appropriation was carried out under an act of the Louisiana legislature which required that before a right of way was appropriated "the exact location thereof shall be determined and made to appear by a proces verbal prepared by the Board of State Engineers of the State of Louisiana and filed in the conveyance records." The Court held that there had been a substantial compliance with the provisions of the act with respect to the notice required.

Petitioner respectfully shows that there is no authority for the conclusion of the Court below that this servitude can be exercised against the property of a citizen without notice, and certainly, there is no authority for the exercise of such a servitude without any action whatsoever by the Levee Board.

The Louisiana courts, to the contrary, have held that the power conferred is not arbitrary and that a citizen has a judicial remedy where oppression or injustice is shown.

In *Peart v. Meeker*, 45 La. Ann. 421, 12 So. 490, the Supreme Court of Louisiana said the following:

> "It is undoubtedly the duty of the public officers charged by the State with the execution of its police power to make no greater sacrifice of private rights than public welfare demands. In several cases this court has said the power so conferred is not arbitrary and that the citizen is not without proper remedy to subject it to judicial control in proper cases."

In *Pruyn v. Nelson*, 180 La. 760, 157 So. 585, the Louisiana Supreme Court said:

"This servitude is limited only by the reasonableness of its use, and the administrative officers of the State of Louisiana are charged with determining that limit, subject to review by the courts only when oppression or injustice is shown and proved."

See also *DuBose v. Levee Commissioners*, 7 La. Ann. 165; *Egan v. Hart*, 45 La. Ann. 1358; *Wolfe v. Hurley*, 46 Fed. (2d) 515.

The majority of the Court was also of the opinion that notice had been given to all persons shown by the assessment rolls to be owners and that under the settled jurisprudence of Louisiana no compensation was due for the exercise of the servitude, (1) if the land is batture, Art. XVI, Sec. 6, Louisiana Constitution forbids payment for batture used or destroyed for levee purposes, and (2) if it is not batture, the same article restricts compensation to properties which have been assessed.

However, the purported notice to which the majority opinion refers, was a notice given by the President of the Levee Board dated October 10, 1947, approximately three months after the work commenced and several weeks after petitioner's timber had been destroyed. It is thus difficult to see how any such notice can be relied upon, particularly in view of the fact that plaintiff was the record owner of the timber and the fact of its assessment or non-assessment is immaterial as will be hereinafter shown.

It is conceded that the land upon which the timber stood should be classified as batture, but Section 6 of Article XVI of the Louisiana Constitution of 1921, which forbids payment for batture used or destroyed for levee purposes, is manifestly

not applicable, as this article insofar as it applies to batture, as well as non-batture lands subject to the servitude, only applies where the destruction is for levee purposes, and not merely to save money, and in any event, under this article, arbitrary and capricious action is prohibited, and the land owner has redress where oppression and injustice are shown. In respect to these principles there is no distinction between batture subject to the riparian servitude and non-batture subject to the riparian servitude. The rule as to no payment in the one case and a payment of assessed value in the other case only applies where the riparian servitude is being exercised for levee purposes, or in any event, only where the servitude is reasonably and properly exercised. For these reasons it is immaterial as to whether or not the property be classified as batture, and the issue of assessment or non-assessment raised by the majority opinion is likewise immaterial.

The majority opinion apparently proceeded on the assumption that the owner of batture has no property right of any kind in such ownership entitling him to any protection even as against willful confiscation and unnecessary destruction of his interest therein. The correct position as to this is fully developed in the dissenting opinion of Judge Cameron from which the following is quoted:

> "It is difficult to understand the position of the majority in holding that the United States had the right to make this assault upon the property of appellee without affording appellee the slightest chance to protect itself, indeed, while forbidding appellee to undertake such self-protection. It is not sufficient to say that appellee bought the timber knowing that it was subject to the exercise of servitude. The majority refers to the rights of such a property owner as if they were possessed of no substance

at all. Here is the way the court below describes the kind of property right appellee had in its timber:

> " 'Notwithstanding the servitude of the civil law, just mentioned, lands fronting on a navigable stream and everything on them having value as property belongs to the riparian owner, down to the mean low water line, L.S.A.-C.C. Articles 455, 457, and may be used, bought and sold even after the construction of levees, the same as any other private property. Timber, oil, gas and other minerals may be taken therefrom by the owner, subject, of course, to the right of the state to insist that levees, public roads, etc., shall not be interfered with or damaged.'

"What then, are the rights of the owner of such private property if it be timber, oil, or similar property? If appellee had erected oil derricks under a proper lease, or had constructed oil storage tanks, would it be held that the State of Louisiana or the United States could destroy or confiscate that property without notice or without giving the owner a chance to salvage it? If dwelling houses or places of business such as wharves were used in the legitimate enjoyment of such property rights, could they be similarly destroyed or confiscated? Is timber any different from oil derricks, storage tanks and structures?"

This statement as to the property rights of an owner of batture is fully supported by all of the Louisiana cases, summed up in an excerpt from which we quote found in *Seibert v. Conservation Commission of Louisiana*, 159 So. 375, in which the Supreme Court of Louisiana said the following:

"It is the well-settled jurisprudence of this state that the contiguous riparian proprietor owns the banks of the

river attached to his property, and this includes the alluvion or batture; and that the banks or rivers and/or streams is the land between the ordinary high-water mark and the ordinary low-water mark. What is the ordinary low-water mark of the Mississippi River? The levee of the Mississippi River, by statute, is designated as the ordinary high-water mark. State v. Richardson, 140 La. 329, 72 So. 984; Wemple v. Eastham, et al., 150 La. 247, 90 So. 637; Pizanie v. Gauthreaux, 173 La. 737, 138 So. 650; Smith v. Dixie Oil Co., 156 La. 691, 101 So. 24; Boyce Cottonseed Oil Manufacturing Co. v. Board of Commissioners, 160 La. 727, 107 So. 506."

A procedure which might well have been followed by the Levee Board in the present case is set forth in the recent case of *Board of Levee Commissioners of Orleans Levee District v. Kelly, et al.*, 225 La. 411, 73 So. (2d) 299 (1954). This was a proceeding for a mandatory injunction against some sixty or more individuals who were occupying dwellings situated on the batture along the Mississippi River in Orleans Parish, Louisiana. The defendants concededly occupied the batture without vestige of title or legal right. They were not riparian owners nor did they claim any rights as riparian owners. The Levee Board was requested to provide certain rights of way to the Army Engineers in connection with an enlargement of the levee. The Levee Board gave notice to all batture dwellers to clear the levee of all buildings and other constructions. Despite the fact that these batture dwellers had no title, and were not riparian owners, they refused to move their dwellings from the batture. Rather than arbitrarily proceeding with the levee improvement the Levee Board filed a suit for a mandatory injunction to require these parties to remove their structures. Certainly if the Levee Board in that case gave proper notice, and after failure to comply with the notices

sought a mandatory injunction, the petitioner in this case, who had a valid recorded title to the timber on the batture, was entitled to more consideration than these parties who did not even have a vestige of title.

In view of the foregoing, it is respectfully submitted that the Court of Appeals erred in its application of the law of the State of Louisiana to the facts of this case; that the Levee Board did not properly exercise its right of appropriation; that, therefore, the Government could not derive any rights from the Levee Board upon which it can rely; and, that, the destruction of plaintiff's timber by Government Contractors, pursuant to the plans and specifications prepared by the Government Engineers, and without notice to plaintiff, and without affording to plaintiff an opportunity to salvage the timber, created an implied promise under the Fifth Amendment to pay for the timber so destroyed.

II

THE COURT OF APPEALS DECIDED THE FEDERAL QUESTION INVOLVED IN THIS CASE IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT

Circuit Justice Cameron in his dissenting opinion very forcefully and eloquently stated the reasons why the action taken by the Government was contrary to the requirements of the Fifth Amendment. Petitioner quotes the following from his opinion and adopts it as its argument (R. 280-284).

> "It is clear that the court below felt that the actions taken by appellant were repugnant to the just compensation and due process clause of the Fifth Amendment of

the Constitution, and no one would question that the United States was fettered at every stage of the proceedings by their terms. In dealing with the property of its citizens, the great and powerful government should keep its action above suspicion of unconstitutionality and as far as possible away from the border line of such a charge.[20]

"We need not pause to discuss the requirements of the Fifth Amendment that the United States is not permitted to take private property for public use without just compensation beyond observing that it hardly seems fair that the salutary provisions of the Amendment should be nullified by the indirect method of taking provided for in the amended Flood Control Act.[21] We pass up further discussion of that clause because it seems so clear that the action of the Government cannot be squared with the due process provisions.

"The Government sent its contractors onto this land and began destroying wealth in a manner which can be characterized as nothing but reckless, whether practiced by an individual or by the sovereignty. The trees it set about destroying had economic values which should have been conserved under the most rudimentary concepts of what is fair and right and consistent with husbandry.

"The most superficial inquiry would have revealed the owner of this timber because the deeds were of record. The government had taken initial steps to begin the

"20 Mr. Justice Holmes well expressed the idea in Federal Trade Commission v. American Tobacco Co., 1924, 264 U.S. 298, 307: 'We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law.'"

"21 It is worthy of note that the Amended Act, 33 U.S.C.A. Cumulative Supplement, 702a-12 provides for reimbursement by the United States of local authorities of reasonable expenditures under local laws and customs; and the government engineer testified that 'since 1941 the Federal Government has been paying a fair market value for lands used or destroyed in the carrying out of flood control plans.'"

prosecution of this work four months before the date of actual beginning. The only precaution it had taken was to write a letter to the Levee Board requesting that it be 'furnished a formal statement by your board that rights-of-way are available for the construction of the enlargement.' If the investigation had been pursued, the government would have found that the Levee Board had not taken any steps or made any minute entries relating to these particular lands or this timber, had not made the first move towards a formal expropriation of the rights of way or the timber on them, and had not notified the property owners that any expropriation was in contemplation, or that any entry upon their lands would ensue.

"The simplest dictates of fairness would have required, in any event, that the Government give the property owners the opportunity to remove things of value from the right of way before their destruction should be begun. If the government had the right to begin destroying timber without notice, it would have had the like right to turn waters upon the lands of these owners without affording opportunity to remove livestock. Whatever muniments of title the Government may have had to the right of way, and whatever assurances it may have possessed with respect to right of entry upon the lands, it had no right whatever to make its entry in such a harsh and ruthless way and with such a wanton disregard of all of the dictates of justice and humanity.

"The foregoing considerations are based upon the assumption that the destruction of the trees was inadvertent and innocent. The fact is, however, as conceded by the government, that the destruction was deliberate and was planned from the outset, and such planned destruction was disclosed to the Levee Board when the government engineers forwarded to that Board a set of the plans on May 19th.

"The Government could save money by permitting the contractor to push whole trees off of the land it was clearing so that dirt might be obtained for levee purposes, instead of permitting appellee to fell and remove the timber, leaving the stumps to be removed by the contractor. 'This was a substantially less expensive method than removing the stumps which appellee's salvaging operation would leave.'[22] That statement from the government's brief, followed by the assertion 'It was pushed over, and thus destroyed, by bulldozers because the contractors' bid was substantially reduced "on the basis of that method of removing the timber" ', leaves no room to doubt that the Government made its plans and let its contracts on the basis of the destruction; and that is verified by the refusal of the contractors to comply with appellee's request, made as soon as he discovered the depredations, that he be permitted to cut the timber which remained in front of the bulldozers.[23]

"But such a course is forbidden by the due process clause of the Fifth Amendment, and what the courts have said in defining its scope and application. Mr. Justice Lamar, speaking for the Supreme Court in a case involving a forced tract connection by a railroad,[24] laid down the rule that such an order could not be sustained, 'merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable * * * '; and held further that the railroad must not be denied the right to show that 'the order was so arbitrary, unjust or unreasonable as to amount to deprivation of property * * * '. And the Supreme Court also held[25] that the Fourteenth Amend-

"22 See statement from government brief, Note 2, supra."
"23 Ib."
"24 Washington, ex rel v. Fairchild, et al, 224 U.S. 510, 524."
"25 Missouri, ex rel v. North, et al, 271 U.S. 40, 42."

ment 'is concerned with the substance and not with the forms of procedure'.

"Mr. Justice Brandeis, in his concurring opinion in the St. Joseph Stockyards case,[26] first used the term 'inexorable safeguard' in holding that no step in a proceeding affecting the rights of a citizen shall be taken 'except upon due notice and opportunity to be heard'. Mr. Justice Cardozo[27] defined due process as 'the protection of the individual against arbitrary action', and repeated again that its essence was the observance of 'the rudiments of fair play.'

"That decision was cited by us in our recent case of City of Meridian v. Mississippi Valley Gas Co.,[28] a case in which we affirmed the action of the lower court in restraining the enforcement of a city ordinance passed without constitutionally adequate notice. We also cited the case of Morgan v. United States in which the Supreme Court twice[29] reversed administrative proceedings for failure to observe the 'fundamental requirements of fairness which are of the essence of due process'.

"And we have recently, in Arndt v. United States,[30] held that government officials must conform their actions to accepted standards of fair play whether those standards are set forth in statutes or regulations or derived from the common acceptation of what is fair in dealings between man and man.

"What the government did in the present case is at war with all of those concepts and ought to be rejected by us, whether we base the rejection on the failure of the Levee

"26 St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 73."
"27 Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292, 302."
"28 214 F. 2d 525, 526 (1954)."
"29 298 U.S. 468 and 304 U.S. 1."
"30 222 F. 2d 484."

> Board to observe Louisiana law or upon the higher ground of failure of the United States to observe common standards of justice and fair play. I do not think this court should give its support to such wanton, unjust and unconstitutional actions. I think the judgment of the District Court was right and should be affirmed."

In addition to what Circuit Justice Cameron said above, we believe that a statement by this Honorable Court made in the case of *Betts v. Brady*, 316 U.S. 455, 462, 62 S. Ct. 1252, 1256; 86 L. Ed. 1595, is particularly appropriate here. In that case this Court made the following statement:

> "* * * Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed."

Looking to the "totality of the facts" in this case, it is manifest that the action taken by the Government was contrary to the requirements of due process, and that its actions should not be sanctioned.

III

INTEREST AT THE LEGAL RATE OF FIVE PER CENT (5%) FROM THE DATE OF ACTUAL TAKING SHOULD BE ALLOWED ON THIS CLAIM

The District Court fixed the damages in the sum of $10,801, as the actual value of the timber destroyed. The formal decree (R. 256) restricted interest on the judgment to four per cent (4%) from the date of the judgment, rather than from the date of the actual taking. The petitioner here gave notice within the time allowed of its intention to prosecute an appeal to the Court of Appeals "from that part of the judgment entered in the above actions on May 17th, 1954, wherein plaintiff was awarded interest on the judgment from date of said judgment rather than from date of actual taking on or about November 1, 1947." (R. 257). The latter is a conservative "taking" or "beginning" date, as admittedly the contracts were let on July 10th and July 11th, 1947, and certainly a legal taking occurred at that time. The work of destroying the trees had been completed by November 1, 1947.

The District Court did not give any reasons for restricting the interest to the date of the judgment. It is rather plain from the other provisions of the decree, however, that what the Court has in mind is:

Section 2516, Title 28 U.S.C.A.:

"(a) Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof.

"(b) Interest on judgments against the United States affirmed by the Supreme Court after review on petition of the United States shall be paid at the rate of four per cent per annum from the date of the filing of the transcript of the judgment in the Treasury Department to the date of the mandate of affirmance. Such interest shall not be allowed after the term of the Supreme Court at which the judgment was affirmed. June 25, 1948, c. 646, 62 Stat. 978."

Here petitioner's recovery is under the Tucker Act, the action being brought for the just compensation under the Fifth Amendment that is available in such cases.

In 54 Am. Jur. 609, Sec. 95, it is said:

"It is a well-settled rule that the United States is not liable for interest on claims against it unless by the terms of an act of Congress it has assumed such liability, or has, by a lawful contract of its administrative or executive officers made within the scope of their duly constituted authority, bound itself to pay interest by a stipulation therefor, **or unless it must pay interest as a part of the just compensation which it is required to make for property taken. . . .**" (Emphasis ours.)

A number of cases were cited by the Government below in support of the suggestion that the interest was to be restricted as is provided in the said Section 2516. The Court apparently applied that principle.

The cases relied upon by the Government below are inapplicable because of peculiar factual distinctions. The cases that are governing are *Seaboard Airline Railway Co. v. United States* (261 U.S. 299, 43 S. Ct. 354, 67 L. Ed. 664); *Danforth*

v. United States (303 U.S. 271, 60 S. Ct. 231, 84 L. Ed. 240) and *Jacobs v. United States* (290 U.S. 13, 54 S. Ct. 26, 78 L. Ed. 142).

The *Jacobs* case is the latest expression of the United States Supreme Court upon the point under facts similar to the present.

In that case plaintiffs, owners of land along a certain body of water in Alabama, were damaged by intermittent floods caused by a Government dam across a body of water. Negotiations for the Government to get flowage easements were undertaken but the land owners being dissatisfied with the amounts offered brought suit under the Tucker Act. They were awarded judgment for value of property damaged with interest from the date of taking. It is to be noted that no formal condemnation proceedings of any kind had been filed by the Government. On appeal, on question of interest alone, the Court of Appeals held that the suits were founded upon an implied contract and hence, that interest could not be allowed. Citing *United States v. North American Transportation and Trading Company* (253 U.S. 330, 64 L. Ed. 935, 40 S. Ct. 518), one of the cases relied upon by the Government below.

The Supreme Court granted certiorari and reversed the Court of Appeals saying:

> "The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that it was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right."

The Court went on to dispose of the *American* case in the following observation:

> "The North American Transportation and Trading Company case rested upon its special facts. There the original taking was torturous and created no liability on the part of the Government. Subsequent action was held to create a liability which rested upon an implied contract. The Court said that the suit was not founded upon the 5th Amendment (253 U.S. 334-335). Suits brought to enforce the Constitutional right to just compensation are governed by later decisions which are directly in point."

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the decision of the Court of Appeals is manifestly erroneous and should be reversed; that petitioner should be awarded damages as fixed by the District Court, and should be allowed interest at the legal rate of five per cent (5%) from the date of taking until paid.

Respectfully submitted,

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APPENDIX

The pertinent portions of Seetion 3 of the Flood Control Act of May 15, 1928, as amended, 33 U.S.C., are contained in Sections 702a (12), 702b and 702c, as follows:

"§ 702a-12. Same; modified Lower Mississippi River Project as of August 18, 1941 . . .

"(d) The Chief of Engineers, with approval of the Secretary of the Army, shall reimburse local authorities for actual expenditures found by the Chief of Engineers to be reasonable, for providing at the request of the United States, in accordance with local legal procedure or custom, rights-of-way and flowage easements required for future setbacks of main-line Mississippi River levees. . . ."

"§ 702b. Same; local contribution toward cost of flood control work . . . in view of the great expenditure estimated at approximately $292,000,000, prior to May 15, 1928, made by the local interests in the alluvial valley of the Mississippi River for protection against the floods of that River; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving floodwaters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required. (May 15, 1928, c 569, § 2, 45 Stat. 535)."

"§ 702c. Same; expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights. Except when

authorized by the Secretary of the Army upon the recommendation of the Chief of Engineers, no money appropriated under authority of this act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of the Army that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of Section 4; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes."

Act 188 of 1904 of the Louisiana Legislature is as follows:

"Providing that standing timber shall remain an immovable, even when separated in ownership from the land on which it stands.

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That standing timber shall remain an immovable, and be subject to all the laws of the State on the subject of immovables, even when separated in ownership from the land on which it stands, provided that nothing in this act shall be construed as altering, affecting or modifying existing laws relative to the assessment and taxation of such timber.

"Section 2. Be it further enacted, etc., That all laws or parts of laws in conflict with this act be, and the same are hereby repealed."

Article XVI, Sections 5 and 6 of the 1921 Louisiana Constitution are as follows:

"§ 5. Cooperation with Federal Government.—All governing authorities of districts which have been, or may be created, are authorized to cooperate with the Federal Government in the construction and maintenance of the levees in this State, on such terms and conditions as may be provided by the Federal authorities and accepted by the State authorities."

"§ 6. Compensation for property used or destroyed for levee purposes—Tax levy.—Lands and improvements thereon hereafter actually used or destroyed for levee or levee drainage purposes, and for acquiring property within the limits of any duly incorporated municipality of one hundred thousand population or over to be used for constructing new streets or highways where it was necessary to take a previously existing street or highway for levees or levee drainage purposes, shall be paid for at a price not to exceed the assessed value for the preceding year; provided that this shall not apply to batture, nor to property the control of which is vested in the state or any subdivision thereof for the purpose of commerce; and provided, further, that streets and highways within the limits of any duly incorporated municipality of one hundred thousand population or over shall be restored by the governing authorities of the levee district upon the new location so acquired in order to replace any street or highway actually used or destroyed for levees or levee drainage purposes, and such street or highway shall be of a similar type or character as that of the street or highway used or destroyed.

"If the district has no other funds or resources out of which such payment can be made, it may levy, on all

taxable property situated therein, a tax sufficient to pay for said property so taken, and for such streets and highways so relocated and restored, within the limits of any municipality of one hundred thousand population or over not to exceed one-fourth of one mill on the dollar, to be used solely in the district where collected. This shall not prevent the appropriation of said property before payment." [As amended, Acts 1928, No. 165, § 1, adopted, November 6, 1928.]"

Article 455 of the Louisiana Civil Code reads as follows:

"Art. 455. Public things; use of river banks. The use of the banks of navigable rivers or streams is public; accordingly every one has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like.

"Nevertheless, the ownership of the river banks belongs to those who possess the adjacent lands."

Article 665 of the Louisiana Civil Code reads as follows:

"Art. 665. Legal public servitudes. Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.

"All that relates to this kind of servitude is determined by laws or particular regulations."

Article 2324 of the Louisiana Civil Code reads in part as follows:

"Art. 2924. Interest is either legal or conventional."

Legal interest is fixed at the following rates, to-wit:

"At five per cent on all sums which are the object of a judicial demand. Whence this is called judicial interest; . . . ."

CERTIFICATE

I, _____, hereby certify that a copy of this brief has been mailed to Simon E. Sobeloff, Solicitor General, Department of Justice, Washington 25, D. C., Perry W. Morton, Assistant Attorney General, Lands Division, Department of Justice, Washington 25, D. C., T. Fitzhugh Wilson, United States Attorney, Shreveport, Louisiana, and Roger P. Marquis and S. Billingsley Hill, Attorneys, Department of Justice, Washington, D. C., by first class mail, postage prepaid, this _____ day of _____, 1956.

_____

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No. 388

In the Supreme Court of the United States

OCTOBER TERM, 1955

GENERAL ELEC. CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 383

GENERAL BOX COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 224 F. 2d 7. The opinion of the district court denying the Government's motion to dismiss (R. 60–63) is reported at 94 F. Supp. 441. The court's opinion after the first trial (R. 318–337) is reported at 107 F. Supp. 981. The final opinion following a new trial (R. 343–351) is reported at 119 F. Supp. 749.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1955 (224 F. 2d 7). A petition for rehearing was denied on August 5,

1955 (224 F. 2d 7), and the petition for a writ of certiorari was filed on September 12, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the United States is liable for the value of timber which it cleared from a right of way in enlarging a levee along the Mississippi River where the right of way had been donated to the United States by a Louisiana Levee Board after it exercised, without notice to the owner of the timber, the state's servitude to use such property without compensation.

STATUTES INVOLVED

The pertinent portions of the Federal Flood Control Act of May 15, 1928, as amended, 33 U. S. C. 702a–12(d), 702b and 702c; Article 16, Sections 5 and 6, of the 1921 Louisiana Constitution; Articles 455 and 665 of the Louisiana Civil Code; and Act No. 188, Acts of 1904, La. Rev. Stats. 9: 1103, are printed at pages 24–27 of Petitioner's Appendix.

Article 465 of the Louisiana Civil Code; Act No. 75, Acts of 1940, La. Rev. Stats. 52:2; and Act No. 76, Acts of 1938, La. Gen. Stats. 6869.3, are printed as an Appendix, *infra*, pp. 14–15.

STATEMENT

Petitioner instituted these two suits under the Tucker Act, 28 U. S. C. 1346 (a) (2), to recover

the value of timber cleared from two tracts of land by contractors of the United States in the enlargement of an existing levee on the main stem of the Mississippi River in Louisiana. The sum of $9,000 was demanded in each case. A total of 260 acres of timber lying between the old levee and the river had been removed. Petitioner owned the timber only. The two cases were consolidated for trial. The material facts are as follows:

The project was undertaken pursuant to the provisions of the Federal Flood Control Act of May 15, 1928, 45 Stat. 534, as amended, 33 U. S. C. 702a, *et seq.* Section 702c of that Act (Pet. App. 24–25) provides that the state shall "provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River." Acting under that provision, the Corps of Engineers, United States Army, submitted its plans to the Board of Commissioners of the Fifth Louisiana Levee District, which is the state agency charged with effectuating the foregoing provision in the area involved here, and requested the necessary rights of way (R. 328; Exhibits G–3, G–4). The President of the Levee Board replied granting the rights of way and his action was approved by the Board (R. 329, 330; Exhibits G–5, G–7). That action by the Levee Board was in the exercise of the servitude for levee purposes which the state of Louisiana has in all lands riparian to navigable rivers.

Thereafter, private contractors employed by the United States commenced clearing the land. Petitioner was not notified and did not learn of the work until after the destruction of its timber had begun. When the contractors were asked by petitioner to discontinue and allow it to cut the timber which remained, the request was refused because the contractors' bids had been made on the basis of bulldozing the standing timber. This was a substantially less expensive method than removing the stumps which petitioner's salvaging operation would leave. (R. 261, 264, 286.) Their contracts with the United States authorized pushing the trees over and out of the area (Exhibits P–6, P–7).

Petitioner than instituted these actions against the United States to recover the value of the timber (R. 5, 86). The United States filed third party complaints bringing in the Levee Board as a defendant (R. 64–67, 96–99). It also moved to dismiss petitioner's complaints as not stating claims upon which relief could be granted, but this was denied (R. 55, 60, 94; 94 F. Supp. 441).

Following a trial, the district court held that the state's servitude was not effectively exercised "without any notice or formal procedure whatever" so that the United States was liable in civil trespass, but that it could recover over against the Levee Board because of the latter's obligation to furnish the rights of way (R. 318–337; 107 F. Supp. 981). On motion for a new trial by the

United States and the Levee Board, further proceedings were had after which the court held that the United States was liable under the Fifth Amendment and could not recover from the Levee Board because of its failure to require an effective appropriation and because it "would be compelled" under Section 702a–12 (d), 33 U. S. C., of the Federal Flood Control Act (Pet. App. 24) to "reimburse local authorities for actual expenditures found by the Chief of Engineers to be reasonable * * * for future setbacks of mainline Mississippi River levees" (R. 343–351; 119 F. Supp. 749). Accordingly, the court dismissed the suits as to the Levee Board and entered judgment against the United States in the total sum of $10,801 (R. 352–353). Interest was allowed at four percent from the date of judgment to 30 days after approval of any appropriation act providing for payment.

The United States appealed on the merits and petitioner appealed for allowance of a larger interest award (R. 354, 357). The court of appeals reversed, one judge dissenting, with directions to enter judgment for the United States (224 F. 2d 7). It held that petitioner's timber was subject to the servitude of use by the state for levee purposes without compensation and that notice and a hearing were not required for the state to exercise a public right which it owned, so that the servitude was correctly exercised by the Levee Board for itself and for the United States.

ARGUMENT

Petitioner contends that the decision of the court of appeals misconstrues the law of the State of Louisiana (Pet. 11–18) and denies due process (Pet. 18–23). Both contentions are based on the court's approval of the exercise of the servitude for levee purposes without according notice to petitioner and an opportunity to salvage the timber. But that ground ignores the plain and constitutional distinction in Louisiana law between appropriation, which is the right in the state to use a property interest which it owns, and expropriation, which is the taking or use of property in which it has no right or interest. The taking here was an appropriation.

Petitioner concedes the existence of the servitude in behalf of the state (Pet. 11, 15), but limits its scope and legal force. The limitation is not warranted. From earliest times in Louisiana, the owner of property bordering upon a navigable stream has been required to give, without compensation, so much thereof as might be needed for the construction of levees. *Wolfe* v. *Hurley*, 46 F. 2d 515 (W. D. La.), affirmed *per curiam*, 283 U. S. 801; *Peart* v. *Meeker*, 45 La. Ann. 421, 12 So. 490; Articles 455 and 665, Louisiana Civil Code. Such property "never passes free of this reservation to a purchaser" and the purchaser takes "knowingly." *Eldridge* v. *Trezevant*, 160 U. S. 452; *Mayor of Vidalia* v. *McNeely*, 274 U. S. 676, 684. The servitude includes all property

"which is within range of the reasonable necessity of the situation as produced by the forces of nature." *Hart* v. *Board Of Levee Com'rs,* 54 Fed. 559 (C. C. E. D. La.); *Board of Com'rs of Tensas Basin Levee District* v. *Franklin,* 219 La. 859, 867, 54 So. 2d 125, appeal dismissed, 342 U. S. 844, on authority of *Eldridge* v. *Trezevant, supra,* and *Wolfe* v. *Hurley, supra.* Property owners must "accommodate themselves to the change, as much so as if such change had been occasioned by the sudden caving of the banks of the river above." *Police Jury of West Baton Rouge* v. *Bozman,* 11 La. Ann. 94. "This rule, of course, antedates both the federal and state Constitutions, and was recognized as coexistent with those principles which were subsequently embraced in the written provisions of the Fifth Amendment to the Federal Constitution and the Bill of Rights, or what is now section 2 of article 1 of the state Constitution 1921; hence the latter were adopted subject thereto." *Wolfe* v. *Hurley, supra,* p. 520.

The right of free use of the servitude was relinquished in part by Article 16, Section 6, of the Louisiana Constitution of 1921 (Pet. App. 26). It provides that "Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes * * * shall be paid for at a price not to exceed the assessed value for the preceding year; provided that this shall not apply to batture * * *." Petitioner

concedes that its timber was on batture (Pet. 15).

The phrase "Lands and improvements thereon" used in the 1921 Louisiana Constitution to define the property subject to the servitude is broad enough in terms to include growing trees. Moreover, Article 465, Louisiana Civil Code, *infra*, p. 14, specifically provides that: "Standing crops * * * and trees before they are cut down * * * are considered as part of the land to which they are attached." There is no recovery for standing crops which are destroyed in the construction of a levee. *Lacour* v. *Red River, Atchafalaya & Bayou Boeuf Levee Dist.*, 158 La. 737, 104 So. 636; *Weeks* v. *Nineteenth Louisiana Levee Dist.*, 165 So. 491 (C. A. La.); *Scott* v. *Red River-Bayou Pierre Levee Dist.*, 7 So. 2d 429 (C. A. La.). It follows that growing trees are equally within the servitude.

The servitude was correctly exercised by the Levee Board for itself and for the United States. The Federal Flood Control Act of May 15, 1928, 45 Stat. 535, 33 U. S. C. 702c (Pet. App. 24–25), requires "the States or levee districts" to give "assurances satisfactory to the Secretary of the Army that they will * * * (c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River * * *."[1] Cf. 33 U. S. C.

[1] Petitioner's reference (Pet. 19, footnote 21; Pet. App. 24) to 33 U. S. C. 702a–12(d), which provides for reimbursement of local authorities by the United States for ex-

701c, 702a–9, 702a–12(e). Article 16, Section 5, of the 1921 Louisiana Constitution (Pet. App. 26), authorizes the Levee Districts "to cooperate with the Federal Government in the construction and maintenance of levees in this State, on such terms and conditions as may be provided by the Federal authorities and accepted by the State authorities." By Act No. 75, Acts of 1940, La. Rev. Stats. 52:2, and Act No. 76, Acts of 1938, La. Gen. Stats. 6869.3, *infra*, pp. 14–15, the Levee Boards "may donate or convey to the United States any lands, movable or immovable property, rights of way, or servitudes which they may own or acquire, for use by the United States in connection with * * * (3) Flood control works." The Board of Commissioners of the Fifth Louisiana Levee District exercised its servitude and donated the necessary rights of way on this particular property to the United States under those statutes.[2]

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penditures "for future setbacks of main-line, Mississippi River levees," is not applicable here. This is an enlargement of an existing levee, not a setback. Also, contrary to the statement in that footnote, the Government's engineer testified that the United States does not pay for rights of way involved in enlargement of levees (R. 309–310).

[2] The Board pledged itself by resolutions of May 16, 1928, and June 16, 1929, to "provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River" (R. 326–327; Exhibits G–1, G–2). By resolution of September 12, 1945, the Board authorized its President "to grant rights of way where the need is immediate, the proper right of way resolution to be passed in the regular manner at the following Board meeting" (R. 329; Exhibit G–6). By letters of May 19, 1947, and

Thus, the United States acquired the right to remove the timber by a valid legal transaction between it and the Levee Board, not through the exercise of its power of eminent domain.[3] *Danziger* v. *United States*, 93 F. Supp. 70 (E. D.

June 10, 1947, the District Engineer, Corps of Engineers, United States Army, advised the Levee Board of the proposed enlargement of the levee, enclosed the plans which included this particular property, and requested "a formal statement by your Board that rights-of-way are available for the construction of the enlargement and granting the United States a right of entry to prosecute the work. This statement may be in the form of a letter signed by the President of the Board" (R. 328; Exhibits G–3, G–4). Referring to the request for a "formal statement * * * that rights-of-way are available," the President of the Levee Board replied on June 12, 1947, that "The Board of Commissioners of the Fifth Louisiana Levee District are hereby glad to comply with your request and render you any assistance possible" (R. 329, Exhibit G–5).

The Board ratified the action of the President at its meeting of July 9, 1947, when the letter by the President to the Corps of Engineers was read and no objections were made. The minutes show that the Board considered that the letter "complied with" the request of the Engineers (R. 330; Exhibit G–7). Subsequent actions and inactions of the Board, as evidenced by the correspondence between the Board and the Corps of Engineers, also show conclusively that the Board had authorized the use of the rights-of-way servitude by the Corps of Engineers (Exhibits G–8 through G–13).

[3] If compensation were owed by the United States under the theory that the servitude was not properly exercised, it appears that it would be entitled to judgment over against the state Levee Board. Moreover, the timber, being on land which was overflowed "almost every year" (R. 212–213, 280–295), was located below ordinary high water mark and hence within the federal navigation servitude. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592.

La.); *Bruyn* v. *Nelson Bros.*, 180 La. 760, 157 So. 585.

The procedure which due process might require for an expropriation of private property is not necessary to the exercise of this servitude. *Hart* v. *Board of Levee Com'rs*, 54 Fed. 599 (E. D. La.); *Peart* v. *Meeker*, 45 La. Ann. 421, 12 So. 490. As the court said in *Board of Com'rs of Tensas Basin Levee District* v. *Franklin*, 219 La. 859, 869–870, 54 So. 2d 125, appeal dismissed, 342 U. S. 844, on authority of *Eldridge* v. *Trezevant*, 160 U. S. 452, and *Wolfe* v. *Hurley*, 283 U. S. 801:

> Despite the repeated contention in numerous litigations that Article 665, imposing this servitude on riparian lands, controverts the constitutional guarantee in both the state and federal Constitutions that no one can be deprived of his inalienable rights of property *without due process of law*, it has been consistently held by this court and by the Supreme Court of the United States that such constitutional requirements relate to the right of expropriation and do not have the effect of abrogating our law giving the state authority to appropriate land upon which rights for the construction of levees, roads, and other such public works have always been reserved. [Emphasis supplied.]

There is "no formal procedure which the levee districts must follow in appropriating property." *Danziger* v. *United States*, 93 F. Supp 70, 72, (E.

D. La.); *Pruyn* v. *Nelson Bros.*, 180 La. 760, 157 So. 585; *Dickson* v. *Board of Com'rs of Caddo Levee District*, 210 La. 121, 26 So. 2d 474. That rule embraces the giving of notice, because when notice is required the state provides for it specifically: *Board of Com'rs* v. *Trouille*, 212 La. 152, 31 So. 2d 700.

Petitioner's reliance on statements in *Pruyn* v. *Nelson Bros.*, *supra*, and *Peart* v. *Meeker*, *supra*, to establish "oppression and injustice" in the lack of notice here (Pet. 14) is unavailing, because those statements relate to "reasonableness of use" of the servitude, not to procedure. The only suggestion in this case as to "reasonableness of use" is that the timber was not actually used in the construction of the levee. The timber had to be removed in order to clear the land. It was pushed over, and thus destroyed, by bulldozers "in the usual manner" because the contractors' bids were substantially reduced "on the basis of that method of removing the timber" as opposed to removing stumps which would have been left by a salvage operation (R. 286, 297, 345). The destruction was, therefore, not unreasonable because the "cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost." *United States ex rel T. V. A.* v. *Welch*, 327 U. S. 546, 554; *Old Dominion Co.* v. *United States*, 269 U. S.

55; *Board of Levee Com'rs* v. *Kelly*, 225 La. 411, 73 So. 2d 301.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1955.

APPENDIX

Article 465 of the Louisiana Civil Code provides:

> *Crops, fruits and trees.*—Standing crops and the fruits of trees not gathered, and trees before they are cut down, are likewise immovable, and are considered as part of the land to which they are attached.
>
> As soon as the crop is cut, and the fruits gathered, or the trees cut down, although not yet carried off, they are movables.
>
> If a part only of the crop be cut down, that part only is movable.

Act No. 75, Acts of 1940, La. Rev. Stats. 52:2, provides:

> *Donations to United States for certain purposes; officers making donations.*
>
> The state or any state agency or subdivision may donate or convey to the United States any lands, movable or immovable property, rights of way, or servitudes which they may own or acquire, for use by the United States in connection with:
>
> (1) The improvement and maintenance of the navigation of natural waterways;
>
> (2) The construction, improvement, and maintenance of artificial navigable waterways, river and harbor works;
>
> (3) Flood control works;
>
> (4) Airports, flying fields, landing fields, parks, forest preserves, canals, irrigation districts, hospitals, agricultural experiment and research stations, military posts and for any military purposes.

> In the case of property owned by Louisiana or any state, branch or agency, the transfer or conveyance shall be performed by the governor with the consent and approval of the lieutenant governor or the attorney general. The commission council or other governing body of a municipality shall transfer or convey property owned by a municipality. In the case of a parish the parish governing authority shall transfer or convey the property and in the case of any other subdivision of the state the governing body shall transfer the property.

Act No. 76, Acts of 1938, La. Gen. Stats. 6869.3, provides:

> *Declaration of policy.*—All levee districts in the state of Louisiana heretofore or hereafter created, are hereby declared to be political subdivisions and agencies of the state of Louisiana, and such levee districts and the boards of commissioners thereof were created and exist and hold and enjoy lands and all rights to said lands, property and property rights in furtherance of a public purpose, and this statute is enacted as an exercise of the state's reserved police power.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 383

GENERAL BOX COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals and the dissenting opinion (R. 262–284) are reported at 224 F. 2d 7. The opinion of the district court denying the Government's motion to dismiss (R. 30–33) is reported at 94 F. Supp. 441. The court's opinion after the first trial (R. 229–242) is reported at 107 F. Supp. 981. The final opinion following a new trial (R. 246–255) is reported at 119 F. Supp. 749.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1955 (R. 285). A petition

for rehearing was denied on August 5, 1955 (R. 291). The petition for a writ of certiorari was filed on September 12, 1955, and was granted on November 7, 1955 (R. 291). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the United States is liable for the value of timber which it cleared from a right of way in enlarging a levee along the Mississippi River, where the right of way had been donated to the United States by a Louisiana Levee Board after it had exercised the state's servitude to use such property without compensation, because (a) the Levee Board did not give notice and a hearing to the owner, or (b) because the timber was removed in a manner which precluded salvage in order to save substantial expense in the levee work.

STATUTES INVOLVED

The majority of the pertinent provisions of the state and federal statutes are set out in the Appendix to petitioner's brief, pp. 30–34. Other pertinent provisions of Louisiana law are printed in the Appendix to this brief, *infra*, pp. 30–32.

STATEMENT

Petitioner instituted these two suits under the Tucker Act, 28 U. S. C. 1346 (a)-(2), to recover the value of timber cleared from two tracts of land by contractors of the United States in the

enlargement of an existing levee on the main stem of the Mississippi River in Louisiana. The sum of $9,000 was demanded in each case. A total of 260 acres of timber, growing on the batture between the old levee and the river, was removed. Petitioner owned the timber only. The two cases were consolidated for trial. The material facts are as follows:

The project was undertaken pursuant to the provisions of the Federal Flood Control Act of May 15, 1928, as amended, 45 Stat. 534, 55 Stat. 642, 33 U. S. C. 702a, *et seq.* Section 3 of that Act (33 U. S. C. 702c, Pet. Br. App. 30) provides that before the United States shall expend funds for flood control on the lower Mississippi River the state shall "provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River." Acting under that provision, the Corps of Engineers, United States Army, submitted its plans for the enlargement of two levees to the Board of Commissioners of the Fifth Louisiana Levee District, which is the state agency charged with effectuating the foregoing provision in the area involved here, and requested the necessary rights of way (R. 295–296). The plans had been approved by the Louisiana Department of Public Works (R. 221, 223, 296). The President of the Levee Board replied by letter granting the requested rights of way and his action was subsequently approved by the Board (R. 297–298).

Such action by the Levee Board was taken for the purpose of exercising the right of the State of Louisiana to a servitude for levee purposes which that State has in all lands riparian to navigable rivers.

Thereafter, private contractors employed by the United States commenced clearing the land. Petitioner was not notified and did not learn of the work until after the destruction of its timber had begun (R. 83). When the contractors were asked by petitioner to discontinue and allow it to cut the timber which remained, the request was refused because the contractors' bids had been made on the basis of bulldozing the standing timber. This was a substantially less expensive method than removing the stumps which petitioner's proposed salvaging operations would leave on the land (R. 185, 187, 204). Their contracts with the United States authorized pushing the trees over and out of the area (R. 203–204; Exhibits P-6, P-7).

Petitioner then instituted these actions against the United States to recover the value of the timber (R. 3, 48). The United States filed third party complaints bringing in the Levee Board as a defendant (R. 33, 56). It also moved to dismiss petitioner's complaints as not stating claims upon which relief could be granted, but this was denied (R. 27, 30, 54; 94 F. Supp. 441).

At the trial, the United States and the Levee Board contended that the timber was legally re-

movable without compensation to the owner, in the customary exercise of a servitude for levee purposes imposed by Louisiana law. The United States additionally contended that under certain provisions of state and federal law the Levee Board should be required to pay any compensation that might be awarded to the claimant.

The district court, sustaining petitioner's claim, held that the state's servitude was not effectively exercised since the Levee Board acted "without any notice or formal procedure whatever", and that the United States was therefore liable in civil trespass, but that it could recover over against the Levee Board because of the latter's obligation to furnish it with the necessary rights of way (R. 229–242; 107 F. Supp. 981). On motion for a new trial by the United States and the Levee Board, further proceedings were had after which the court held that the United States was liable under the Fifth Amendment to the United States Constitution, but that it could not recover from the Levee Board because of its failure to require an effective exercise of the servitude and because it "would be compelled" under Section 3 of the Federal Flood Control Act of May 15, 1928, as amended (55 Stat. 643, 33 U. S. C. 702a–12 (d), Pet. Br. App. 30), to "reimburse local authorities for actual expenditures found by the Chief of Engineers to be reasonable * * * for future setbacks of main-line Mississippi River levees"

(R. 246–254; 119 F. Supp. 749). Accordingly, the court dismissed the suits as to the Levee Board and entered judgment for $10,801 against the United States, representing the market value of the timber (R. 256). Interest was allowed at four percent from the date of judgment to 30 days after approval of any appropriation act providing for payment.

The United States appealed on the merits and petitioner appealed for allowance of a larger interest award (R. 257, 258). The court of appeals, one judge dissenting, concluded that the United States was not liable and reversed with directions to enter judgment for the United States (R. 262–284; 224 F. 2d 7). It held that petitioner's timber was subject to the servitude of use by the state for levee purposes without compensation; that notice and a hearing were not prerequisite to an exercise by the state of a public right which it owned; and that, in this case, the servitude had been fully and validly exercised by the Levee Board for itself and for the United States.[1]

[1] Since the court of appeals held that the United States was not liable, it did not reach the interest question discussed by petitioner (Br. 26–29). Of course, if this Court should hold that there has been a taking of a property under the Fifth Amendment, the award should include compensation for delay in payment represented by interest from the date of taking. In view of its holding that the United States was not liable, the court of appeals also failed to reach the question whether the Levee Board was liable over to the United States.

SUMMARY OF ARGUMENT

I

A. From earliest times in Louisiana, property riparian to the Mississippi River has been subject to a servitude in the public for levee purposes. All private ownership in such property is subject to the servitude by its very title, and a purchaser takes "knowingly." The servitude is a property interest owned absolutely by the state so that no compensation is owed when it is exercised and used by the state. The servitude may extend miles distant from the river and includes all lands, improvements, growing crops, and standing timber which are within the reasonable necessity of the situation as produced by the forces of nature. Therefore, petitioner's growing trees, located on the batture between the levee and the river, were plainly within the servitude.

B. The Levee Board correctly exercised the servitude and donated the right of way to the United States in accordance with state and federal law. In Louisiana law, exercise of this servitude is an *appropriation*, which is use by the state of a property interest which it already owns. Such action is not an *expropriation*, which is the taking of property in which the state has no interest. No notice or hearing is necessary before an appropriation is made.

There was no unreasonable use of the servitude or oppression and injustice in prosecuting the

public work of levee construction in the most economical way.

II

If the United States is liable, it is entitled to recover over from the Levee Board because, by provisions of state and federal law and the transactions in this case, the Levee Board bound itself to provide the right of way free of cost to the United States. Hence, should the Court hold the Government liable, the case should be remanded to the court below for the purpose of determining whether the Levee Board is liable to indemnify the United States.

ARGUMENT

I

The United States is not liable to pay compensation for petitioner's timber because it was removed under valid exercise of Louisiana's riparian servitude for levees, to which the timber had always been subject

Petitioner contends that the decision of the court of appeals misconstrues the law of the State of Louisiana and denies due process. Both contentions are based on that court's holding that the state properly exercised the levee servitude historically attaching to riparian lands and appurtenances on navigable rivers in Louisiana, despite the fact that the state gave no notice of its action and the further fact that petitioner was given no opportunity to salvage the timber on the lands appropriated for levee purposes. But these contentions ignore the plain and constitu-

tional distinction in Louisiana law between an *appropriation*, which is a right in the state to use a property interest that it already owns, and an *expropriation*, which is the taking or using by the state of property in which it has no right or interest. The former leaves no constitutional obligation to compensate; the latter requires compensation.

In Louisiana, it is historical that the state owns absolutely a levee servitude on riparian lands on navigable rivers, and it has never agreed to compensate for the exercise of such a servitude on land in a batture area. The exercise of the servitude by the state in the instant case, for the purpose of transferring it to the United States for execution, was an appropriation. It was but the exercise of an absolute right of the state in land situated in the batture area, on which petitioner's timber stood, to use the land for levee purposes, and the destruction of the timber as part of the land, the removal of which was a *sine quo non* to the use of the land for levee purposes, was incidental to and a part of the action by the state in availing itself of the benefits of the servitude. The exercise of the servitude by the state required the taking of the soil and, *a fortiori*, encompassed the necessity of removing everything on the land, including timber, which interfered with that operation. In the circumstances, removal of the timber was necessary to the exercise of the state's ownership in the servitude. And

since the right to the servitude conferred by the state upon the United States was as broad as its own rights, the exercise by the United States of that servitude was no different from what it would have been had the state exercised the servitude itself. Consequently, the action of the United States in having the timber removed, by the most economical method feasible in the course of enlarging the levee, was no more than an appropriation. Since, under Louisiana law, the state would have been under no duty, either statutory or constitutional, to compensate, had it destroyed the timber while enlarging the levee itself, the United States, as the state's transferee, likewise was free of any duty to respond in compensation.

The levee servitude is unique to Louisiana and derives from the extreme threat of flood waters to vast areas in the state by reason of their low elevation at the end of the Mississippi Valley drainage system. Because of that threat, private rights in riparian lands have always been subject, by their very titles, to the exercise, without compensation, of the state's paramount ownership of the flood plain for levee purposes. Petitioner concedes the existence of that servitude in behalf of the state (Br. 12–13), but would surround its use with conditions limiting its force and effectiveness. Such limitations are inconsistent with the very nature and purpose of the servitude, and should not be recognized. The

conditions to the use of the servitude urged by petitioner have never before been required by Louisiana law or decision, and no valid basis has been presented which would warrant this Court in imposing them.

A. The timber was subject to the exercise of the riparian servitude without compensation

From earliest times in Louisiana, the owner of property bordering upon a navigable stream has been required to give, without compensation, so much thereof as might be needed for the construction of levees. *Wolfe* v. *Hurley,* 46 F. 2d 515 (W. D. La.), affirmed *per curiam,* 283 U. S. 801; *Peart* v. *Meeker,* 45 La. Ann. 421, 12 So. 490; Articles 455 and 665, Louisiana Civil Code (Pet. Br. App. 33). Such property "never passes free of this reservation to a purchaser" and the purchaser takes "knowingly." *Eldridge* v. *Trezevant,* 160 U. S. 452; *Mayor of Vidalia* v. *McNeely,* 274 U. S. 676, 684. Because of the broad flood plains in Louisiana, the servitude may extend "miles distant" from the river, and it includes all property "which is within range of the reasonable necessity of the situation as produced by the forces of nature." *Hart* v. *Board of Levee Com'rs,* 54 Fed. 559 (C. C. E. D. La.); *Dickson* v. *Board of Com'rs of Caddo Levee District,* 210 La. 121; 26 So. 2d 474; *Board of Com'rs of Tensas Basin Levee District* v. *Franklin,* 219 La. 859, 867, 54 So. 2d 125, appeal

dismissed, 342 U. S. 844, on authority of *Eldridge* v. *Trezevant, supra,* and *Wolfe* v. *Hurley, supra.*

Property owners must "accommodate themselves to the change, as much so as if such change had been occasioned by the sudden caving in of the banks of the river above." *Police Jury of West Baton Rouge* v. *Bozeman,* 11 La. Ann. 94. "Houses and works on land thus brought under such a servitude, must, like the land of which they form part, be yielded up to public service, without compensation, for their demolition is the act, not of man, but of God and the law." *Bass* v. *State,* 34 La. Ann. 494, 498. The taking of soil from the flood plain to enlarge a levee is within the servitude and the riparian proprietor "*cannot* deprive the public of that right of use at their pleasure, or *impose any but legal limitations on it.*" [Emphasis added.]. *Pulley & Erwin* v. *Municipality No. 2,* 18 La. 278, 284. "This rule, of course, antedates both the federal and state Constitutions, and was recognized as coexistent with those principles which were subsequently embraced in the written provisions of the Fifth Amendment to the Federal Constitution and the Bill of Rights, or what is now section 2 of article 1 of the state Constitution of 1921; hence the latter were adopted subject thereto." *Wolfe* v. *Hurley, supra,* at p. 520.

The right of free use of the servitude was relinquished in part by Article 16, Section 6, of

the Louisiana Constitution of 1921 (Pet. Br., App. 32). It provides that "Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purpose * * * shall be paid for at a price not to exceed the assessed value for the preceding year; *provided that this shall not apply to batture* * * *." [Emphasis added.] As a source of funds for such payment, the constitution authorizes the Levee Districts to "levy, on all taxable property situated therein, a tax sufficient to pay for said property so taken, * * * not to exceed one-fourth of one mill on the dollar" and provides, further, that "This shall not prevent the appropriation of said property before payment." The nature and scope of the provision was explained in *Mayer* v. *Board of Com'rs for Caddo Levee Dist.*, 177 La. 1119, 1126, 150 So. 295, as follows:

> It appears, therefore, from the foregoing, that whatever section 6 of article 16 of the Constitution of 1921 may give to the owner of land, subject to the servitude for levee purposes, is *in the nature of a gratuity*. It is a payment made by the agency of the state—the levee district—*for what already belonged to the state* at the time of the adoption of the Constitution. The Constitutional Convention of 1921 was evidently prompted, in adopting the provision, to lessen, so far as the means of the public authorities would permit, the burden of the servitude resting on lands, border-

ing on navigable streams, and growing out of the necessities of the situation. *Care should be taken, therefore, not to carry the spirit of the provision beyond its clear intendment, and thereby render, perhaps, the state unable to discharge its duty of protecting a large part of the public from inundation.* [Emphasis added.]

Payment for batture was expressly excluded from the "gratuity" which that provision of the 1921 Louisiana Constitution allowed to be paid "for what already belonged to the state." Petitioner concedes that its timber was on batture (Pet. Br. 16–17).[2]

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[2] The court of appeals correctly defined "batture" as "that part of the river bed which is uncovered at the time of low water but is covered annually at the time of ordinary high water" (R. 266).

Petitioner's reference to "non-batture lands" (Pet. Br. 17) is without significance. The 1921 Constitution permits recovery only for property other than batture and limits that recovery to "a price not to exceed the assessed value for the preceding year." Petitioner did not allege in its complaint or show that either the lands on which the timber stood or the timber itself was assessed for the preceding year. When a right of action depends for its existence upon a statutory or constitutional grant, it cannot extend beyond the terms of the grant. *Ward* v. *Board of Levee Com'rs*, 152 La. 158, 92 So. 769. For that reason, the Louisiana courts have uniformly held that "it is necessary for the plaintiff, in a suit for compensation for property used or destroyed for levee purposes, to allege that the property was assessed for taxes in the preceding year, and to allege what the amount of the assessment was, for that is all that the plaintiff could have a right of action for." *Lacour* v. *Red River, Atchafalaya & Bayou Boeuf Levee Dist.*, 158 La. 737, 104 So. 636; *Weeks* v. *Nineteenth Louisiana Levee Dist.*, 165 So. 491.

The phrase "Lands and improvements thereon" used in the Louisiana Constitution to define the property subject to the servitude is plainly broad enough in terms to include growing trees. Moreover, Article 465, Louisiana Civil Code, *infra*, p. 30, specifically provides that: "Standing crops * * * and trees before they are cut down * * * are considered as part of the land to which they are attached." Act No. 188, Acts of 1904, La. Rev. Stats. 9:1103 (Pet. Br. App. 31) likewise provides: "Standing timber shall remain an immovable, and be subject to all the laws relative to immovables, even when separated in ownership from the land on which it stands." There is no recovery for standing crops which are destroyed in the construction of a levee. *Lacour* v. *Red River, Atchafalaya & Bayou Boeuf Levee Dist.*, 158 La. 737, 104 So. 636; *Weeks* v. *Nineteenth Louisiana Levee Dist.*, 165 So. 491 (C. A. La.); *Scott* v. *Red River-Bayou Pierre Levee Dist.*, 7 So. 2d 429 (C. A. La.). It follows that growing trees are equally within the servitude.

B. The servitude was correctly exercised by the Levee Board without oppression and injustice or denial of due process of law.

The Federal Flood Control Act of May 15, 1928, Sec. 3, 45 Stat. 534, 535–536, 33 U. S. C. 702c (Pet. Br. App. 30), requires "the States or levee dis-

(C. A. La.); *Fletcher* v. *Nineteenth Louisiana Levee Dist.*, 165 So. 495 (C. A. La.); *Scott* v. *Red River-Bayou Pierre Levee Dist.*, 7 So. 2d 429 (C. A. La.); *Dickson* v. *Board of Comrs of Caddo Levee District*, 210 La. 121, 26 So. 2d 474.

tricts" to give "assurances satisfactory to the Secretary of the Army that they will * * * (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes."[3] Cf. 33 U. S. C. 701c, 702a–9, 702a–12 (e). By Article 16, Section 5, of the 1921 Louisiana Constitution (Pet. Br. App. 32), the Levee Districts are given authority "to cooperate with the Federal Government in the construction and maintenance of the levees in this State, on such terms and conditions as may be provided by the Federal authorities and accepted by the State authorities." By Act No. 75, Acts of 1940, La. Rev. Stats. 52:2, and Act No. 76, Acts of 1938, La. Gen. Stats. 6869.3, *infra*, pp. 31–32, the Levee Boards "may donate or convey to the United States any lands, movable or immovable property, rights of way, or servitudes which they may own or acquire, for use by the United States in connection with: * * * (3) Flood control works."

[3] The reference by petitioner (Pet. Br. 21), the district court (R. 254), and the dissent below (R. 281) to 33 U. S. C. 702a–12 (d), which provides for reimbursement of local authorities by the United States for expenditures "for future setbacks of main-line Mississippi River levees," is not applicable here. This is an enlargement of an existing levee, not a setback (R. 222–223). Also, the statement of the dissent below (R. 281), adopted by petitioner (Pet. Br. 21), to the effect that the Government's engineers testified that the United States pays for rights of way involved in the enlargement of levees is inaccurate. They testified to the contrary (R. 222–223).

In the present case, the Board of Commissioners for the Fifth Louisiana Levee District duly exercised the State's levee servitude and donated the necessary rights of way on this particular property to the United States, in the following manner. The Board had pledged itself by resolutions of May 15, 1929, and June 16, 1929, to "provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River" (R. 292–294). By resolution of September 12, 1945, the Board authorized its President "to grant rights of way where the need is immediate, the proper right-of-way resolution to be passed in the regular manner at the following Board meeting" (R. 297–298). By letters of May 19, 1947, and June 10, 1947, the District Engineer, Corps of Engineers, United States Army, advised the Levee Board of the proposed enlargement of the levee, *enclosed the plats which included this particular property*, and requested "a formal statement by your Board that rights-of-way are available for the construction of the enlargement and granting the United States a right of entry to prosecute the work. This statement may be in the form of a letter signed by the President of the Board" (R. 295–296). Referring to the requests for a "formal statement * * * that rights-of-way are available," the President of the Levee Board replied on June 12, 1947, that "The Board of Commissioners of

the Fifth Louisiana Levee District hereby is glad to comply with your request and render you any assistance possible" (R. 297). The granting of the rights of way was also approved by the Louisiana Department of Public Works (R. 221, 223, 296).

The Board ratified the action of its President at its meeting of July 9, 1947,[4] when the letter by the President was read and no objections were made. The minutes of the meeting show that the Board considered that the letter "compiled with" the request of the Engineers (R. 298). Subsequent actions and inactions of the Board, as evidenced by the correspondence between the Board and the Corps of Engineers, also show conclusively that the Board had authorized the use of the rights-of-way servitude on this property by the Corps of Engineers (R. 299–304). On the basis of this donation by the Levee Board, the United States, through its contractors, entered upon the property and removed the timber in the process of enlarging the levee.[5]

---

[4] The dissent below acknowledged that: "July 9th a resolution was passed by the Levee Board * * *" (R. 272).

[5] In addition to the foregoing exercise of the servitude, it would seem that the servitude had already been exercised at the time of the construction of the original levee. Certainly, continuing use of the batture between the levee and the river as a source of soil to maintain and repair the levee was contemplated and the existence of the levee was notice, to all persons, of the continuing use of the servitude at this place.

Thus, the United States did not acquire or destroy the timber through the exercise of its sovereign power to take private property, but its action in removing the timber was incident to a valid transaction between it and the Levee Board.[8] As the court said in *Danziger* v. *United States*, 93 F. Supp. 70, 72 (E. D. La.), in dismissing a similar action: "It is clear from the evidence and the testimony that the Pontchartrain Levee District and not the United States of America appropriated the necessary rights of way in connection with the construction of Diamond Levee Setback. Consequently there is no basis for this action against the United States." The Board in this case exercised its servitude through the instrumentality of the Corps of Engineers. As was said in *Pruyn* v. *Nelson Bros.*, 180 La. 760, 769, 157 So. 585, "The customary way" for a Levee Board to exercise the servitude "is to delegate to the contractor the right to remove the soil from the batture." The Louisiana court further said in that case (180 La. at 768):

> *The United States government*, through the War Department, represented by the

[8] As will be shown, *infra*, pp. 27-29, if compensation were owed by the United States under the theory that the servitude was not properly exercised, it would be entitled to judgment over against the state Levee Board. Moreover, the timber, being on land which was overflowed "almost every year" (R. 116-117, 169-212), was located below ordinary high water mark and hence within the federal navigation servitude. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592.

> United States engineers, in its program of promoting flood control, navigation, and interstate commerce, *is a proper authority to exercise that servitude*, particularly where the plan and contract for the erection of the levee have been approved by the Pontchartrain levee board and the state board of engineers. [Emphasis added.]

That ruling finds support in the long history of federal improvements of the rivers in Louisiana, particularly the Mississippi.

Petitioner asserts (Pet. Br. 7) that the "minute entry [of the Board] does not purport to show that emergency action was required." There is no requirement that the minute entry show it. The official request for the right of way and the prompt granting of it by the President of the Board are sufficient to show an immediate need. As has been often held respecting a similar matter, the "mere request to the Attorney General to file a condemnation action" is "a sufficient indication of an administrative finding of the necessity for the taking." *United States* v. *30.75 Acres of Land in DuPage County, Ill.*, 76 F. Supp. 239, 245 (N. D. Ill.); *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66–67; *United States* v. *San Geronimo Development Co.*, 154 F. 2d 78, 86 (C. A. 1), certiorari denied, 329 U. S. 718. Petitioner offered no evidence that the need was not immediate. The fact that "these two low sections" of the levee system had to be enlarged

"during the coming working season" because "[a]fter elimination of the Eudora Floodway, it was necessary to come back and enlarge the main line levees of the Mississippi River" manifests the need for prompt action (R. 223, 295, 296). And the early letting of the contracts, which petitioner criticizes (Pet. Br. 14, 26), also strongly suggests that haste was paramount.

Petitioner contends that the servitude was not validly exercised as to its property because it was not given advance notice and a hearing (Pet. Br. 20–25). That contention ignores the plain and valid distinction in Louisiana law between an appropriation and an expropriation. There is no requirement that the State of Louisiana must accord notice and a hearing to exercise a right which it has or to appropriate and use a property interest which it owns. This is not a taking from another but a use of what already belongs to the state. The procedure which due process might require for an expropriation of private property has been consistently held not to apply to the exercise of this servitude for levee purposes.[7] *Hart* v. *Board of Levee Com'rs*, 54 Fed. 559 (E. D. La.); *Peart* v. *Mecker*, 45 La.

[7] Petitioner's reliance on the statements in the dissent below (Pet. Br. 22; R. 272, footnote 11; R. 282) that the Levee Board "had not made the first move towards a formal expropriation of the rights of way or the timber on them, and had not notified the property owners that any expropriation was in contemplation" is, therefore, plainly misplaced.

Ann. 421, 12 So. 490. As the Louisiana court said in *Board of Com'rs of Tensas Basin Levee District* v. *Franklin*, 219 La. 859, 869–870, 54 So. 2d 123:

> Despite the repeated contention in numerous litigations that Article 665, imposing this servitude on riparian lands, controverts the constitutional guarantee in both the state and federal Constitutions that no one can be deprived of his inalienable rights of property *without due process of law*, it has been consistently held by this court and by the Supreme Court of the United States that *such constitutional requirements relate to the right of expropriation* and do not have the effect of abrogating our law giving the state authority to appropriate land upon which rights for the construction of levees, roads, and other such public works have always been reserved. [Emphasis added.]

Appeal in that case was dismissed by this Court (342 U. S. 844), on authority of *Eldridge* v. *Trezevant*, 160 U. S. 452, and *Wolfe* v. *Hurley*, 283 U. S. 801.

In *Wolfe* v. *Hurley* (46 F. 2d at p. 516), the contention was made that the "proposed action of the levee board and the agents of the government is without due process of law, and will deprive them of their property without just compensation, in violation of said amendments to the Federal Constitution; that no offer of compensation has

been made to them, nor have any proceedings for the expropriation of their lands been instituted." A three-judge district court rejected the contention on the ground that the principles of due process applicable to takings of private property did not apply to the exercise of the servitude (46 F. 2d at p. 520. See *supra*, pp. 12, 21–22).

In *Pruyn* v. *Nelson Bros.*, 180 La. 760, 157 So. 585, that principle was applied to a situation almost identical to that involved here. Following approval by the levee board and the state board of engineers of the plans submitted by the Army, the contractor entered directly upon the batture and commenced removing soil as called for by the plans. In suing for an injunction and damages, the riparian proprietor contended that the servitude "was not exercised in a legal manner or by proper authority." The court denied relief, stating (180 La. at 769): "The law does not provide that the administrative officers shall follow any particular procedure in exercising the servitude, as in appropriation [8] proceedings. The customary way is to delegate to the contractor the right to remove the soil from the batture." In *Danziger* v. *United States*, 93 F. Supp. 70, 72 (E. D. La.), the court said: "There is no formal procedure which levee districts must follow in appropriating property." While notice was given in that case, as

[8] It is plain from the context that the court intended "appropriation" in the sense of "expropriation."

petitioner points out (Pet. Br. 14), there is no indication that the holding required it and the broad sweep of the quoted language would doubtless have been qualified if some "formal procedure" were required. The fact that notice is often given does not establish that it is required.[9] In *Dickson v. Board of Com'rs of Caddo Levee District*, 210 La. 121, 132, 26 So. 2d 474, after relating the long history of the servitude and the necessity for it, the court said:

> These provisions remain in our codal law today, with the result that while in all of the remaining states of the Union lands necessary for levee purposes can only be used after expropriation and proper indemnification, *in Louisiana the state has the right to act first*, i. e., the authority to appropriate such land to a use to which it is subject under its very title, *and talk later*. [Emphasis added.]

It is plain from the above that notice and a hearing are not required before the state exercises the levee servitude. When the state desires that notice shall be given before appropriating property for levee purposes, it provides for

[9] Petitioner's statement that the Levee Board in the *Danziger* case removed the improvements "at its expense" (Pet. Br. 14) is not supported by that decision. Moreover, Article 861, Louisiana Civil Code, *infra*, p. 30, provides that improvements built on batture "may be destroyed at the expense of those who claim them."

notice by express statutory provision. *Board of Com'rs* v. *Trouille*, 212 La. 152, 31 So. 2d 700.[10]

Petitioner also contends that the servitude was not validly exercised because there was "oppression and injustice" in the fact that it was not permitted to remove its timber (Pet. Br. 12–20). It asserts that the limitation of "reasonableness of use" prohibited the removal of the timber in the most economical way. The contention lacks merit. Removal of the timber in the manner described by petitioner "would have nearly doubled" the cost of removing it (R. 185, 187, 204).[11] The "cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost." *United States ex rel. T. V. A.* v. *Welch*, 327 U. S. 546, 554; *Old Dominion Co.* v. *United States*, 269 U. S. 55, 56. That principle has been consistently applied by the courts of Louisiana in sustaining appropriation of property for levee purposes where the use of the particular property could have been avoided, but at greater cost. *Dickson* v. *Board*

[10] For comparison, this Court has consistently held that advance notice and hearing are not required by the process prior to the exercise of the power of eminent domain. *Bragg* v. *Weaver*, 251 U. S. 57; *Ridge Co.* v. *Los Angeles*, 262 U. S. 700, 709; *Joslin Co.* v. *Providence*, 262 U. S. 668, 678; *Adirondack Railway* v. *New York State*, 176 U. S. 335, 349.

[11] This would have been true even if petitioner had had notice, and had then gone on the land to remove the trees. The remaining stumps would have increased the cost of the work to the Government.

of Com'rs of Caddo Levee District, 210 La. 121, 26 So. 2d 474; *Board of Com'rs. of Tensas Basin Levee District* v. *Franklin,* 219 La. 859, 54 So. 2d 125, appeal dismissed, 342 U. S. 844; *Board of Levee Com'rs* v. *Kelly,* 225 La. 411, 73 So. 2d 301.

The decisions defining due process (Pet. Br. 20–25) relied on by petitioner have no bearing on the instant case, for, as we have shown above, the principles of due process applicable to the taking of private property do not control the exercise of the servitude here involved. Accordingly, those cases are inapposite. And as we have further shown, petitioner's charge of oppression and injustice, which is based solely on the asserted unreasonableness of a use prompted by economy, is contrary to settled law on that subject. Thus, the cases cited by petitioner (Pet. Br. 13–20), touching upon "reasonableness of use" but dealing with subject matters other than cost, are not in point. Moreover, in none of the decisions relied upon by petitioner was it actually held that there had been an unreasonable use.

The decision in *Tilden* v. *United States,* 10 F. Supp. 377 (W. D. La.), relied upon in the dissent below (R. 270, 271) and cited by the district court (R. 252) as an instance wherein the United States was required to pay "the full value" under the Fifth Amendment for a right of way for a levee, is not pertinent. That case was governed by the provisions of 33 U. S. C. 702d which require

the United States to pay compensation under the Fifth Amendment for "flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River" and to take title and convey the title to the local authorities. In such circumstance, neither the Levee Board nor the United States acts under the state's servitude. Those facts are not present here. The distinction is pointed out in *Danziger* v. *United States*, 93 F. Supp. 70, 72 (E. D. La.).

In short, this case presents a situation where the land, together with its appurtenances, was subject, under a long-established doctrine coexistent with the Louisiana Constitution, to being appropriated to the public use for levee purposes without compensation. The land appropriated here has been devoted to that exact purpose and petitioner does not and cannot properly challenge that fact. Petitioner's contention that the method used to clear the land gives rise to a constitutional obligation to pay compensation is, therefore, without merit.

II

If there is liability, the United States is entitled to recover over from the Levee Board

The servitude, as shown above, was correctly exercised by the Levee Board and the rights of way donated to the United States in accordance with the provisions of state and federal law.

Therefore, neither the Levee Board nor the United States is liable to pay compensation. However, should the Court be of the opinion that compensation is owed by the United States under any theory, we submit that it is entitled to judgment over against the Levee Board by virtue of the statutes and transactions set out, *supra*, pp. 16–18.

The district court held (R. 254) that the United States, rather than the Levee Board, should pay the award because Section 3 of the Federal Flood Control Act as amended (33 U. S. C. 702a–12 (d)), (Pet. Br. App. 30) provides that: "The Chief of Engineers, with approval of the Secretary of the Army, shall reimburse local authorities for actual expenditures found by the Chief of Engineers to be reasonable, for providing at the request of the United States, in accordance with local legal procedure or custom, rights-of-way and flowage easements required for future setbacks of main-line Mississippi River levees." But the project here is not the construction of a setback levee. It is an enlargement of an existing levee (R. 222–223). Accordingly, 33 U. S. C. 702a–12 (d) has no application to this project and such has been the administrative construction (see footnote 3, p. 16, *supra*). And under Section 702a–12 (d), the district court lacked authority to require the United States to pay, in the absence of an administrative finding of reasonableness.

The right of way is governed by 33 U. S. C. 702c (Pet. Br. App. 30–31), which requires that "the States or levee districts provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River." Cf. 33 U. S. C. 701c, 702a–9, 702a–12c. Hence, the Levee Board was chargeable with that duty, and was answerable to the United States therefor. However, since the court below did not pass upon the question of the liability of the Levee Board to the United States, it is submitted, in the event this Court finds the United States liable, that the case should be remanded to the court below, where all parties are present, for a determination of that question.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Article 465 of the Louisiana Civil Code provides:

> *Crops, fruits and trees.*—Standing crops and the fruits of trees not gathered, and trees before they are cut down, are likewise immovable, and are considered as part of the land to which they are attached.
>
> As soon as the crop is cut, and the fruits gathered, or the trees cut down, although not yet carried off, they are movables.
>
> If a part only of the crop be cut down, that part only is movable.

Article 861 of the Louisiana Civil Code provides:

> *Works in public places—Destruction.*—Works which have been formerly built on public places, or in the beds of rivers or navigable streams, or on their banks, and which obstruct or embarrass the use of these places, rivers, streams, or their banks, may be destroyed at the expense of those who claim them, at the instance of the corporation of the place, or of any individual of full age residing in the place where they are situated.
>
> And the owner of these works cannot prevent their being destroyed under pretext of any prescription or possession, even immemorial, which he may have had of it, if it be proved that at the time these works were constructed, the soil on which they are built was public, and has not ceased to be so since.

Act No. 75, Acts of 1940, La. Rev. Stats. 52:2, provides:

Donations to United States for certain purposes; officers making donations

The state or any state agency or subdivision may donate or convey to the United States any lands, movable or immovable property, rights of way, or servitudes which they may own or acquire, for use by the United States in connection with:

(1) The improvement and maintenance of the navigation of natural waterways;

(2) The construction, improvement, and maintenance of artificial navigable waterways, river and harbor works;

(3) Flood control works;

(4) Airports, flying fields, landing fields, parks, forest preserves, canals, irrigation districts, hospitals, agricultural experiment and research stations, military posts and for any military purposes.

In the case of property owned by Louisiana or any state branch or agency, the transfer or conveyance shall be performed by the governor with the consent and approval of the lieutenant governor or the attorney general. The commission council or other governing body of a municipality shall transfer or convey property owned by a municipality. In the case of a parish the parish governing authority shall transfer or convey the property and in the case of any other subdivision of the state the governing body shall transfer the property.

Act No. 76, Acts of 1938, La. Gen. Stats. 6809.3, provides:

Declaration of policy.—All levee districts in the state of Louisiana heretofore or

hereafter created, are hereby declared to be political subdivisions and agencies of the state of Louisiana, and such levee districts and the boards of commissioners thereof were created and exist and hold and enjoy lands and all rights to said lands, property and property rights in furtherance of a public purpose, and this statute is enacted as an exercise of the state's reserved police power.

No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1955

GENERAL BOX COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE STATE OF LOUISIANA AS AMICUS CURIAE

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GENERAL BOX COMPANY, PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE STATE OF LOUISIANA AS AMICUS CURIAE

The State of Louisiana, through its Attorney General, respectfully submits this brief as amicus curiae, acting pursuant to Rule 42 of the Rules of this Honorable Court.

OPINIONS BELOW

1. Opinion of the Court of Appeals and dissenting opinions (R. 262-284); reported, 224 F. 2d 7.

2. Opinion of the District Court denying motion of the United States to dismiss (R. 30-33); reported, 94 F. Supp. 441.

3. District Court's opinion on first trial (R. 229-242); reported, 107 F. Supp. 981.

4. District Court's opinion following new trial (R. 246-255); reported, 119 F. Supp. 749.

JURISDICTION

Federal Jurisdiction was invoked under 28 U.S.C. 1346. The judgment of the Court of Appeals was entered on June 17, 1955 (R. 285). The petition for rehearing was denied on August 5, 1955 (R. 291). The petition for a writ of certiorari was filed on September 12, 1955, and the same was granted on November 7, 1955 (R. 291). The jurisdiction of this court has been invoked pursuant to 28 U.S.C. 1254 (1).

QUESTION PRESENTED

The interest of the State of Louisiana in this case is restricted to the sole question of whether or not Section 6, Article XVI of the Louisiana Constitution of 1921 provides the only compensation payable for lands and improvements thereon used or destroyed for levees or levee drainage purposes in the State of Louisiana.

STATUTES INVOLVED

The relevant and applicable provisions of the Flood Control Act of May 15, 1928, as amended, 33 U.S.C., Secs. 702 a (12), 702 b, and 702 c. Act 188 of 1904 of the Louisiana Legislature. Articles 455 and 665 of the Louisiana Revised Civil Code.

Sections 5 and 6, Article XVI of the Louisiana Constitution of 1921.

STATEMENT

Petitioner, General Box Company, instituted two suits in the United States District Court for the Western District of Louisiana, seeking under the Tucker Act, 28 U.S.C., Sec. 1346, to recover damage for the value of timber removed from or destroyed on two tracts of land by contractors of the United States in enlarging a levee on the Mississippi River in Louisiana. The two cases were consolidated for purpose of trial.

The enlargement project was undertaken under the provisions of the Flood Control Act of May 15, 1928, 45 Stat. 534, as amended, which in part provides for the acquisition of rights-of-way for levee construction along the Mississippi River, without cost to the United States.

Acting pursuant to Section 5, Article XVI of the Louisiana Constitution of 1921, as amended, authorizing Levee Boards to cooperate with the United States in levee construction or enlargement projects, the Board of Commissioners of the Fifth Louisiana Levee District granted the necessary rights-of-way, requested by the United States, following approval of the plans by the Louisiana Department of Public Works. (See R. 295, 296, 221, 223, 296, 297 and 298).

Private contractors under employ by the United States began clearing the land and removing or

destroying timber on the rights-of-way. Petitioner, General Box Company, then filed suits to recover the value of the timber (R. 3,48). The Levee Board was brought into court under third-party complaints (R. 33,56). The United States moved to dismiss petitioner's complaint but such motion was denied (R. 27,30,54; 94 F. Supp. 441).

Section 6, Article XVI of the Louisiana Constitution of 1921, as amended, reads in part as follows:

> "Land and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes, and for acquiring property within the limits of any duly incorporated municipality of one hundred thousand population or over to be used for constructing new streets or highways where it was necessary to take a previously existing street or highway for levees or levee drainage purposes, shall be paid for at a price not to exceed the assessed value of the preceding year; provided, that this shall not apply to batture, nor to property the control of which is vested in the State or any subdivision thereof for the purpose of commerce; and provided further, that streets and highways within the limits of any duly incorporated municipality of one hundred thousand population or over shall be restored by the governing authorities of the levee district upon the new location so acquired in order to replace any street or highway actually used or destroyed for levees or levee

drainage purposes, and such street or highway shall be of a similar type or character as that of the street or highway used or destroyed."

The United States and the Levee Board contended that the foregoing provisions of the Louisiana Constitution provided the exclusive means and method under Louisiana law to compensate for lands and improvements thereon used or destroyed for levees or levee drainage purposes, and that no recovery could be had for removal or destruction of the value of the timber except as restrictively contemplated by the constitutional provisions aforesaid.

The District Court held that the United States was liable in civil trespass but that no restitution could be demanded by the United States against the Levee Board. The court dismissed the suits as to the Levee Board and awarded General Box Company judgment for $10,801.00 against the United States.

On appeal to the Court of Appeals, Fifth Circuit, with one judge dissenting, the judgment of the lower court was reversed and directions were given to enter judgment for the United States. In effect, the Court of Appeals held that the timber was subject to the servitude of use (Section 6, Article XVI, Louisiana Constitution) and that the servitude was properly exercised by the Levee Board and the United States.

SUMMARY OF ARGUMENT

1. Article XVI, Section 6, Louisiana Constitution of 1921 provides the only compensation under Louisiana law for the exercise of the public servitude therein expressly mentioned.

2. The exercise of such servitude is an APPROPRIATION, no hearing, notice or prescribed procedure being necessary.

3. The servitude extends over all lands, improvements, growing crops, and standing timber, within such distance from the river and its banks as is reasonably necessary to cope with the physical situation and forces of nature.

4. Articles 455 and 665 of the Louisiana Revised Civil Code are the sources of the servitude, the exercise of which is contemplated by Article XVI, Section 6 of the Louisiana Constitution of 1921, and that prior to 1921 no compensation whatever was provided by Louisiana law for the use of said servitude.

5. Lands and improvements thereon used or destroyed for levees or levee drainage purposes can only be subject to compensation if assessed for taxation the year previous to the exercise of such servitude.

ARGUMENT

1.

Article XVI, Section 6, Louisiana Constitution of 1921 provides the only compensation under

Louisiana law for the exercise of the public servitude therein expressly mentioned.

Article 455 of the Louisiana Revised Civil Code reads as follows, to-wit:

> "The use of the banks of navigable rivers or streams is public; accordingly every one has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like.
>
> Nevertheless the ownership of the river banks belongs to those who possess the adjacent lands."

Article 665 of the Louisiana Revised Civil Code reads as follows, to-wit:

> "Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.
>
> All that relates to this kind of servitude is determined by laws or particular regulations."

In *Wolfe* v. *Hurley*, 46 F. 2d 515, 520 (1930), affirmed 283 U.S. 801, the court held in part:

> "From ancient times, and until quite recently, in Louisiana, the civil law has required the owner of property bordering upon a navigable stream to give, without compensation, so much thereof as might be needed for the construction of levees and highways. Civ.

Code La. Art. 655; Code Napoleon, Art. 650; *Dubose* v. *Levee Commissioners*, 11 La. Ann. 167; *Bass* v. *State of Louisiana*, 34 La. Ann. 494, and authorities cited therein; *Pontchartrain Railroad* v. *Board of Levee Commissioners*, 49 La. Ann. 570, 21 So. 765 . . ."

". . . Property bordering upon navigable streams throughout the rest of the state continued to bear the burden of this servitude without compensation, until 1921, when Section 6 of Article 16 was placed in the constition. . . ."

* * * *

". . . For this reason, in so far as the taking of any lands which could have been demanded before the change is concerned, we see nothing in the Fourteenth Amendment that affects the provisions of Section 6 of Article 16 of the constitution of 1921. In other words, being in legal contemplation of gratuity, its extent was subject to the will of the lawmakers fixing the assessed value as the maximum price to be paid for lands used for levee purposes. . . ."

* * * *

"We conclude that the servitude contemplated by article 665, which, as above stated, is based upon immemorial principles, applies, not only to property which actually adjoins the river's edge, but to all of that which is within range of the reasonable necessities of the situation, as produced by the forces of nature, unaided by artificial causes."

See also *Peart* v. *Meeker*, 45 La. Ann. 421, 12 So. 490; *Mayer* v. *Board of Com'rs. for Caddo Levee District*, 117 La. 1119, 150 So. 295 (1933).

In recognition of this firmly established principle in Louisiana law and jurisprudence, it was enunciated in *Eldridge* v. *Trezevant*, 160 U.S. 452, and in *Mayor of Vidalia* v. *McNeely*, 274 U.S. 676, that property adjoining or abutting a navigable stream never passes free of the reservation of such servitude into the hands of a purchaser and that the purchaser takes title "knowingly" or with full knowledge of the existing servitude. *Mayer* v. *Board of Com'rs. for Caddo Levee District, supra*, refers to the grant of the servitude as a "gratuity", and holds that the servitude was a right belonging to the state when the constitution was adopted.

Petitioner cannot deny what the Louisiana Constitution provides or that such means of compensating for an erstwhile gratuity has been exclusively followed in Louisiana since 1921. Petitioner cannot successfully attack the constitutionality of Article XVI, Section 6 of the Louisiana Constitution of 1921 as being repugnant to the Federal Constitution, for the constitutionality of such provisions in the substantive law of Louisiana was effectively upheld in *Eldridge* v. *Trezevant*, supra; *Board of Com'rs. of Tensas Basin Levee District* v. *Franklin*, 219 La. 859, 54 So. 2d 125, appeal

dismissed 342 U.S. 844, rehearing denied 342 U.S. 889.

Petitioner appears to take the position that the removal or destruction of growing timber must be dealt with separately in determining compensation due the owner of such timber, viewing the removal or destruction of same as a civil trespass which is not governed by La. Const. Art. XVI, Sec. 6. No such distinction ever appears to have been drawn in our jurisprudence.

True, timber may be assessed apart from the land, if separately owned, but Article XVI, Section 6 of the Louisiana Constitution expressly refers to "lands and improvements thereon." If the timber is owned by and assessed to one person and the land is owned by and assessed to another, compensation would be due each, based on the separate assessments.

But it is rejugnant to and inconsistent with the Louisiana Constitutional provisions here analyzed to deal with lands and improvements thereon separately, whereby the assessed value of the former would be the criterion of restitution and an award for civil damages in a tort action the measure of compensation for the latter.

Article 465 of the Louisiana Revised Civil Code reads in part as follows:

> "Standing crops and the fruits of trees not gathered, and trees before they are cut down, are likewise immovable, and are considered

as part of the land to which they are attached. . . ."

The same code article treats of trees that are felled or cut down as movables, but Article XVI, Section 6 of the Louisiana Constitution of 1921 deals with IMPROVEMENTS, as well as lands, and makes no distinction between values of growing crops or trees and of crops or trees that are gathered and removed.

As enunciated in *Lacour* v. *Red River, Atchafalaya and Bayou Boeuf Levee District*, 158 La. 737, 104 So. 636, under La. Const. Art. XVI, Section 6, relating to payment for property used or destroyed for levee purposes, no recovery can be had for destruction of growing crops. Since Article 465 of the Louisiana Revised Civil Code places growing crops and trees before they are cut down in the same property category, then no recovery could be had for the destruction of growing timber.

2.

The exercise of such servitude is an appropriation, no hearing, notice, or prescribed procedure being necessary.

Petitioner belabors the point, and treats it as essential, that certain prescribed procedure, i.e.; notice and hearing, be followed in pursuing Article XVI, Section 6 of the Louisiana Constitution (Br. pp. 13-20). This contention is not supported by Louisiana jurisprudence. Since the state owns the

servitude, it may exercise it at will, and need only determine compensation due on the basis of readily available tax rolls. Notice and hearing could only be a superfluous undertaking. In *Board of Com'rs.* v. *Trouville*, 212 La. 152, 31 So. 2d 7 (1947), the court held that no notice of exercising the servitude was necessary, and in *Danziger* v. *United States*, 93 F. Supp. 70, it was held that no formal procedure was essential in pursuing the appropriation.

Petitioner appears to view the exercise of the servitude as an expropriation. It is an APPROPRIATION. *Danziger* v. *United States, Supra; Board of Com'rs.* v. *Trouville, Supra.*

The nature of the action is explained in *Wilson* v. *Aetna Insurance Company;* La. App. 1935, 161 So. 650, and in *Wilson* v. *Royal Insurance Company*, La. App. 1935, 161 So. 653:

> "The taking of reparian land for levee purposes is the 'exercise of a servitude' or an '*appropriation for public use*', though not an *expropriation*, and leaves only the naked title in the owner to whom right to use the land will revert in case it should no longer be needed for levee purposes." (Emphasis supplied).

To exercise an existing servitude is not to expropriate in the field of eminent domain. And, as held in many cases, including *Hart* v. *Board of Levee Com'rs.*, 54 Fed. 599; *Peart* v. *Meeker*,

supra, and *Board of Com'rs. of Tensas Basin Levee District* v. *Franklin*, supra, the procedure required for due process does not apply to the exercise of a servitude for levee purposes.

3.

The servitude extends over all lands, improvements, growing crops, and standing timber, within such distance from the River and its banks as is reasonably necessary to cope with the physical situation and forces of nature.

In the important case of *Wolfe* v. *Hurley*, supra, now approaching landmark significance, the court said (46 Fed. 2d 515, at page 522):

> "We conclude that the servitude contemplated by Article 665, which, as above stated, is based upon immemorial principles, applies, not only to property which actually adjoins the river's edge, but to all of that which is within range of the reasonable necessities of the situation, as produced by the forces of nature, unaided by artificial causes."

The same principle, in effect, was enunciated in *Pruyn* v. *Nelson*, 180 La. 760, 157 So. 585 (1934):

> "This servitude is limited only by the reasonableness of its use, and the administrative officers of the State of Louisiana are charged with determining that limit, subject to review by the Courts only when oppression or injustice is shown and proved."

Petitioner points out no oppression or injustice. The need of removing the timber is not denied. Complaint is chiefly made in regard to lack of notice and hearing. To say that the removal or destruction of timber was oppressive in this case is only to state that the exercise of the servitude in a constitutional manner worked injustice on petitioner.

4.

Articles 455 and 665 of the Louisiana Revised Civil Code are the sources of the servitude, the exercise of which is contemplated by Article XVI, Section 6 of the Louisiana Constitution of 1921, and that prior to 1921 no compensation whatever was provided by Louisiana law for the use of said servitude.

In *Wolfe* v. *Hurley*, Supra, the court referred to La. Civil Code Art. 665 as reflecting the Louisiana Law, based on Code Napoleon Art. 665, as requiring the owner of property bordering upon a navigable stream to give, without compensation, so much thereof as might be needed for the construction of levees and highways; then the court, noting the exception made in regard to appropriations by the Orleans Levee Board, said:

> "Thereafter, property bordering upon navigable streams throughout the rest of the State continued to bear the burden of this serviude without compensation, until 1921,

when Section 6 of Article 16 was placed in the constitution."

Again referring to Articles 455 and 665 of the Louisiana Revised Civil Code, the court said in *Dickson* v. *Board of Com'rs. of Caddo Levee* District, 210 La. 121, 26 So. 2d 474:

> "Prior to the adoption of Const. 1921, property used for construction and drainage of levees other than property in district under control of Orleans Levee Board, was not paid for, notwithstanding constitutional guaranty that one cannot be deprived of his property except for public purposes and after adequate indemnification, since a servitude was imposed upon all lands bordering on navigable rivers and streams for the construction and maintenance of levees, roads and other common or public works."

It is clearly, therefore, to be seen that the people of Louisiana, in adopting the 1921 Constitution, did not destroy Articles 455 and 665 of the Louisiana Revised Civil Code but only lifted the exercise of the servitude from a mere gratuity to compensation based on assessed valuation of property used or destroyed for levee purposes.

5.

Lands or improvements thereon used or destroyed for levees or levee drainage purposes can only be subject to compensation if assessed for taxation the year previous to the exercise of such servitude.

Counsel for the State of Louisiana have not seen the transcript of evidence in this case and they are uninformed concerning the assessment vel non of the timber for taxation for the year preceding the removal or destruction of the timber. If, however, as counsel are informed, petitioner, General Box Company, owned the timber apart from the fee of the lands on which it was grown, it appears clear and certain that the timber would have had to be assessed for the year preceding the exercise of the servitude, if the provisions of Const. Art. XVI, Sec. 6 are to be applied. In the absence of such assessed valuation, no basis for compensation is provided. And if the timber was not assessed for that year, petitioner cannot resort to an action for civil trespass in the alternative, only to undertake destruction of the legal principles, long settled in Louisiana Law, as to the right of the state to exercise a servitude on lands bordering upon a navigable river or stream for levee purposes, free from an action for damages.

The assessed value of land taken for levee purposes is conclusive on owners as to actual value. *Green* v. *Board of Com'rs. of Lake Borgne Basin Levee District*, 163 La. 117, 111 So. 619, (1927). Compensation for property used or destroyed for levee purposes cannot be recovered, if property was not assessed for taxes in last year before use or destruction thereof. *Lacour* v. *Red River Atcha-*

Atchafalaya and Bayou Boeuf Levee District, 158 La. 737, 104 So. 636 (1925).

In the *Lacour* case, last above cited, the court directed its attention to the following question: "Is it necessary for the plaintiff to allege, in a suit for compensation for the loss of property used or destroyed for levee purposes, that the property was assessed for taxes in the preceding year." The court answered that question to say, "yes; it is necessary for the plaintiff, in a suit for compensation for property used or destroyed for levee purposes, to allege that the property was assessed for taxes in the preceding year, and to allege what the amount of the assessment was, for that is all that the plaintiff could have an action for. When a right of action depends for its existence upon a statutory or constitutional grant, it cannot extend beyond the terms of the grant."

CONCLUSION

For the reasons above set forth, the judgment of the Court of Appeals should be affirmed.

March, 1955

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 383

GENERAL BOX COMPANY,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable, the Supreme Court of the United States:

Comes now, General Box Company, petitioner in the above entitled and numbered cause, and presents this petition for a rehearing of the above entitled cause and in support thereof, respectfully shows:

1.

This Honorable Court has held that petitioner's property was effectively appropriated by State authorities and that, therefore, the United States as the donee of the property could destroy petitioner's property without compensation. This Court was of the opinion that the Louisiana Courts had made no pronouncements which controlled the issues here presented and made its own determination on the question of local law involved. This Court concluded that under the law of Louisiana "The State as owner of the servitude legally could have destroyed the timber without prior notice and without any opportunity for mitigation of losses, and yet be free of liability to petitioner."

2.

Petitioner now shows that this pronouncement as to the law of Louisiana is erroneous and that the Louisiana Supreme Court has in many cases clearly and unequivocally enunciated the legal principles applicable to the issues here presented. Under the decisions of that Court the servitude for constructing and enlarging levees is limited by the reasonableness of its use and when oppression and injustice is shown the property owner is not without a remedy and the Court will review the action of the State authorities. *Dubose v. Levee Commissioners*, 7 La. Ann. 165; *Peart v. Meeker*, 45 La. Ann. 421, 12 So. 490; *Egan v. Hart*, 45 La. Ann. 1358; *Pruyn v. Nelson Bros.*, 180 La. 760, 157 So. 585.

3.

Petitioner concedes that the Louisiana Courts have never established an inflexible rule that notice must be given in all

cases prior to the exercise of the servitude for the reason that where there is imminent danger of a flooding condition it would be reasonable and proper not to give such notice.

4.

Petitioner further shows that the issue of notice raised in the present case is only one of the issues of fact to be taken into account in determining whether or not the action of the State authorities has been unreasonable and whether or not oppression or injustice has been shown.

5.

In the instant case the trial Judge, Judge Dawkins, reached a conclusion of fact that the action of the Levee Board was unreasonable and that "oppression" and "injustice" had been shown. In reaching this conclusion Judge Dawkins, who is the only member of the Louisiana Bar who has participated as a judge in this case, was suffering from no misconception as to the applicable Louisiana law. One of the facts taken into account by the trial court was that under the circumstances of this particular case it would have been reasonable and proper to give notice. In reaching this conclusion the trial court did not hold, and it was not necessary for him to hold, that under Louisiana law notice is always required before State authorities can act. The District Court in reaching its conclusion, therefore, correctly applied the applicable law of the State of Louisiana to the facts and circumstances of this case, and this Court and the Court of Appeals has reversed the decision of the trial court on a question of fact where no manifest error has been shown, and contrary to the principle that a trial court will not be reversed on an issue

of fact unless the findings of fact are clearly erroneous. Rule 52, F.R.C.P.

6.

Petitioner respectfully shows that a rehearing should be granted herein for the reason that this Honorable Court has erred in the judgment rendered herein and that this error was caused by failure to properly apply the local law applicable to the case, and by a failure to apply the principle that findings of fact of a trial court will not be reversed unless clearly erroneous.

7.

Petitioner further shows that this Honorable Court has apparently reserved its decision on whether the due process clause of the Fifth Amendment has been violated. As to this the Court said:

> ". . . Petitioner did not assert in its complaints or in its question presented on petition for certiorari that the destruction violated the Due Process Clause of the Fifth Amendment."

8.

Petitioner respectfully shows that one theory of its case has always been that it was not accorded due process under the Fifth Amendment, and that for this reason petitioner was entitled to just compensation under that same amendment. This issue was developed in the original complaint, in the opin-

ions below, and in the petition for certiorari and in the brief before this Court.

9.

In the original complaint filed herein the following allegation was made:

> "That the destruction of said timber was the taking of said timber, the property of the plaintiff, within the meaning of the Fifth Amendment to the Federal Constitution; and plaintiff as owner is entitled to compensation for the full and true value thereof." (R. 25, R. 51).

10.

Justice Cameron in the dissenting opinion in the Court of Appeals discussed this issue thoroughly, and petitioner quoted extensively from his opinion in the petition for certiorari, and in the brief filed before this Court.

11.

Petitioner therefore respectfully urges as an additional ground for granting a rehearing herein that this Court should make a determination as to whether or not the due process clause of the Fifth Amendment has been violated.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the United States Court of Appeals for the Fifth Circuit be upon further consideration reversed, and that judgment be rendered in favor of petitioner awarding

petitioner damages as fixed by the District Court, and allowing interest at the legal rate from the date of taking until paid.

Respectfully submitted,

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Attorneys for Petitioner

By _____
Edward Donald Moseley

CERTIFICATE

I, counsel for the above named General Box Company, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith, and not merely for the purposes of delay, and a copy thereof has been mailed to Simon E. Sobeloff, Solicitor General, Department of Justice, Washington 25, D. C., Perry W. Morton, Assistant Attorney General, Lands Division, Department of Justice, Washington 25, D. C., T. Fitzhugh Wilson, United States Attorney, Shreveport, Louisiana, and Roger P. Marquis and S. Billingsley Hill, Attorneys, Department of Justice, Washington, D. C., by first class mail, postage prepaid, this 18th day of May, 1956.

Edward Donald Moseley